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No.

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

PROMETHEUS RADIO PROJECT, ET AL.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the Federal Communications Commission's modifications to its regulations regarding local television, local radio, and cross-media ownership were not supported by a reasoned analysis.

PARTIES TO THE PROCEEDING

Respondents who were petitioners in the court of appeals below are: Prometheus Radio Project, Media General, Inc., National Association of Broadcasters, CBS Television Network Affiliates Association, the NBC Television Affiliates, ABC Television Network Affiliates, the Network Affiliated Stations Alliance, Fox Entertainment Group, Fox Television Stations, Inc., Viacom, Inc., National Broadcasting Company, Inc., Telemundo Communications Group, Inc., Sinclair Broadcast Group, Inc., Media Alliance, Paxson Communications Corporation, National Council of the Churches in Christ in the United States, Tribune Company, Emmis Communications Corporation, Center for Digital Democracy, Fairness and Accuracy in Reporting, Clear Channel Communications, Minority Media & Telecommunications Council, American Hispanic Owned Radio Association, Civil Rights Forum on Communications Policy, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, National Association of Latino Independent Producers, National Coalition of Hispanic Organizations, National Council of La Raza, National Hispanic Media Coalition, National Indian Telecommunications Institute, National Urban League, Native American Public Telecommunications, Inc., PRLDEF-Institute for Puerto Rican Policy, UNITY: Journalists of Color, Inc., and Women's Institute for Freedom of the Press.

Respondents who were intervenors in the court of appeals below are: Newspaper Association of America, Gannett Company, Inc., Belo Corporation, Morris Communications Company, LLC, Nassau Broadcasting Holdings, Inc., Nassau Broadcasting II, LLC, Family Stations, Inc., Sunbelt Communications Company, Press Communications, LLC, Diversified Communications, Simmons Media Group, Millcreek Broadcasting, LLC, Consumer Federation of America, Con-

sumers Union, Univision Communications, and Capitol Broadcasting Company.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States and the Federal Communications Commission, respectfully files this conditional cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case. The Court should deny the petitions for a writ of certiorari in Nos. 04-1020, 04-1033, 04-1036, and 04-1045. If, however, the Court were to grant one or more of those petitions, it should also grant this cross-petition. If the Court denies those petitions, it also should deny this cross-petition.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-190a[1]) is reported at 373 F.3d 372. The report and order of the Federal Communications Commission (Pet. App. 206a-723a) is reported at 18 F.C.C.R. 13,620.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 2004. A petition for panel rehearing was granted in part on September 3, 2004 (Pet. App. 191a-193a). On November 22, 2004, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including January 3, 2005. On December 21, 2004, Justice Souter further extended the time within which to file a petition for a writ of certiorari to and including January 31, 2005, and the petitions were filed on January 28 and January 31, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, and the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, are set out in an appendix to this cross-petition. App., *infra*, 1a-4a.

STATEMENT

This case arises from the Federal Communications Commission's congressionally mandated reexamination of its longstanding regulations governing the ownership of radio and television broadcast stations that operate pursuant to federal licenses. A divided panel of the court of appeals concluded that the Commission had failed to provide a reasoned analysis in support of the precise ownership limitations adopted in the recent revision. The court accordingly

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[1] Unless otherwise indicated, "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 04-1020.

remanded those regulations to the Commission for further justification. Pet. App. 12a.

The petitions in Nos. 04-1020, 04-1036, and 04-1045 challenge the settled rule that the FCC's broadcast ownership limitations are subject only to rational-basis review under the Constitution. The petitions in Nos. 04-1033, 04-1036, and 04-1045 challenge the Third Circuit's conclusion that, as a statutory matter, FCC decisions to maintain or establish such limitations do not require a special, higher justification than would be applicable to FCC decisions to relax or eliminate such limitations.

This cross-petition does not concern the legal standards—constitutional or statutory—governing review of the FCC's broadcast ownership rules. Instead, it challenges the court of appeals' conclusion that, under ordinary standards governing judicial review of administrative action, the Commission failed adequately to justify some elements of its new rules. The government believes that the most appropriate course in this case would be to permit proceedings on remand before the Commission to go forward, so that the agency could address the Third Circuit's concerns about the adequacy of its justifications and adopt a concrete set of rules that would be suitable for judicial review. In the event that the Court disagrees with that conclusion, however, the Court should not grant review to consider the abstract arguments of petitioners regarding the appropriate standard for review of broadcast ownership rules, without also granting this cross-petition so that the Court would have before it and could consider in a concrete fashion the validity of the rules that the Commission actually adopted.

1. The Communications Act of 1934, 47 U.S.C. 151 *et seq.*, comprehensively addresses the transmission and use of radio signals in the United States. The Act prohibits radio transmissions that are not authorized under a license from the Commission, 47 U.S.C. 301, and requires that any assign-

ment or transfer of such a license receive the Commission's prior approval, 47 U.S.C. 310(d). The Act also specifies that Commission licenses to engage in radio communications are valid "for limited periods of time," 47 U.S.C. 301, after which they expire unless renewed, 47 U.S.C. 307(c); see 47 U.S.C. 309(k) (renewal standard for broadcast licenses).

Before it may grant, renew, or approve the assignment or transfer of a radio license, the Commission must conclude that such action would serve "the public interest, convenience, and necessity." 47 U.S.C. 309(a), 310(d); see 47 U.S.C. 309(k). With respect to licenses authorizing radio and television broadcasting services, the Commission has long favored diversification of mass media ownership as benefiting the public interest "by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power." *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978) (*NCCB*). At the same time, however, the Commission has recognized that its broadcast licensing policies should promote the "sometimes conflicting" public interest goal of ensuring "the best practicable service to the public." *Id.* at 782 (quoting *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394 (1965)). As this Court has recognized, the Act does not require the Commission to give either policy "controlling weight in all circumstances." Rather, the Act leaves that "weighing of policies" under the public interest standard to the Commission's judgment "in the first instance." *Id.* at 810; see *NBC* v. *FCC*, 319 U.S. 190, 224 (1943) ("It is not for [the courts] to say that the 'public interest' will be furthered or retarded" by the Commission's regulations.).

2. To facilitate its own implementation of the Act with respect to individual license applications, and to provide certainty to the broadcast industry, the Commission has adopted generally applicable regulations that embody its judgments about the circumstances in which the issuance,

assignment, or transfer of radio and television station licenses would serve the public interest. See, *e.g.*, *United States* v. *Storer Broad. Co.*, 351 U.S. 192, 202-205 (1956). Those regulations have established limits on the number of radio or television stations a single party may own nationally or in a local market, as well as limits on cross-ownership of broadcast licenses and other media in the same market. See, *e.g.*, *ibid.* (upholding ownership limits on radio and television stations); *NCCB*, 436 U.S. at 793-802 (upholding nationwide prohibition on cross-ownership of daily newspapers and broadcast stations). Under the regulations, the Commission deems proposed broadcast combinations that violate its ownership limits inconsistent with the public interest, absent a showing that a waiver of a rule is warranted in a particular case. See *id.* at 793; *Storer Broad. Co*, 351 U.S. at 205; *NBC*, 319 U.S. at 225.

In the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, Congress directed the Commission to make a number of changes to the broadcast ownership rules that were in effect at that time. For instance, the 1996 Act directed the Commission to eliminate its national limit on radio station ownership and to establish less restrictive radio ownership limits for local markets. 1996 Act § 202(a) and (b), 110 Stat. 110. Likewise, with regard to broadcast television stations, the 1996 Act required the Commission to ease its national ownership limit and to conduct a rulemaking to reexamine its limits on ownership of multiple television stations in local markets. 1996 Act § 202(c)(1) and (2), 110 Stat. 111.

In addition to those specific directives, the 1996 Act imposed a general duty on the Commission to conduct a periodic review of the media marketplace and tailor its broadcast ownership rules in accordance with its findings. Section 202(h) of the 1996 Act provided that the "Commission shall review its rules * * * biennially" to determine "whether

any of such rules are necessary in the public interest as the result of competition." 110 Stat. 111-112. Section 202(h) also requires the Commission to "repeal or modify any regulation it determines to be no longer in the public interest." 110 Stat. 112.

3. In September 2002, the Commission initiated its third biennial proceeding to review its broadcast ownership rules under Section 202(h). *2002 Biennial Regulatory Review*, 17 F.C.C.R. 18,503 (2002) (*2002 Biennial Review*). The 2002 biennial review incorporated other rulemaking proceedings that the Commission had previously initiated to reexamine its regulations governing radio station ownership in local markets and common ownership of daily newspapers and broadcast stations in local markets. That consolidated proceeding culminated on July 2, 2003, with the release of the Report and Order at issue in this case. As relevant here, the Report and Order established a new cross-media rule to govern cross-ownership of daily newspapers, television stations, and radio stations, and modified two other rules that limit common ownership of multiple radio and multiple television stations in a single local market.

Cross-Media Rule. As modified by the Commission, the cross-media rule prohibited combinations involving a daily newspaper and a broadcast station, or a radio station and a television station, in local markets with three or fewer television stations. Pet. App. 521a-522a (Order ¶ 454); 04-1036 Pet. App. 661a. In local markets that have four to eight television stations, such cross-media combinations would be permitted with certain limitations. Pet. App. 530a (Order ¶ 466); 04-1036 Pet. App. 661a. In local markets with nine or more television stations, which, the Commission found, "tend to have robust media cultures characterized by a large number of outlets and a wide variety of owners," the Commission

declined to impose any cross-media limit. Pet. App. 534a (Order ¶ 473).

In establishing its cross-media limits, the Commission utilized a "Diversity Index"—a tool based loosely on the Herfindahl-Hirshmann Index (HHI) used in antitrust analysis—to "inform [its] judgments about the need for ownership limits" and "where [the agency] should draw lines between diverse and concentrated markets." Pet. App. 480a (Order ¶ 391). The Commission did not adopt the Diversity Index as an ownership rule; rather, it used the Index "for analyzing and measuring the availability of outlets that contributed to viewpoint diversity in local media markets." *Ibid.* The Commission emphasized that the Diversity Index was not designed to "measure diversity in specific markets," but to "capture generalized, typical market structures" that the Commission could consider in formulating nationally applicable cross-media limits. *Id.* at 480a-481a (Order ¶ 392).

Local Television Ownership Rule. Like the cross-media rule, the Commission's revised local television ownership rule established ownership restrictions that were tied to the number of television stations in the local market. Under the rule, a party could own two commercial television stations in individual markets with 17 or fewer television stations, and three commercial stations in markets with 18 or more television stations. Pet. App. 290a-291a (Order ¶ 134); 04-1036 Pet. App. 660a-661a. The rule, moreover, prohibited combinations involving the four highest-rated television stations in the market. Pet. App. 331a (Order ¶ 186); 04-1036 Pet. App. 661a. This "top four" restriction thus would preclude common ownership of multiple television stations in markets with four stations or fewer.

Local Radio Ownership Rule. Finally, the Commission retained its numerical limits on local radio station ownership, which Congress had directed the Commission to establish in the 1996 Act. Much like the local television rule, the local

radio rule provided that the number of commercial radio stations a single party may own in a local market would depend on the number of radio stations located in the market. Although it did not change the numerical caps themselves, the Commission did change its application of those limits in two ways: It revised the method of determining the scope of the radio market to which the rule's numerical limits apply, Pet. App. 390a-391a (Order ¶¶ 273-274), and it required inclusion of noncommercial radio stations when counting the number of radio stations in the market, *id.* at 408a (Order ¶ 295); see also 04-1036 Pet. App. 659a-660a.[2]

4. Several petitions for review were filed in various circuits within the ten-day filing window established for the triggering of a judicial lottery. See 28 U.S.C. 2112(a)(3). The Third Circuit was selected by lottery to review the Commission's decision. On September 3, 2003, the court of appeals stayed the Commission's revised rules pending its review of the Report and Order. Pet. App. 194a-196a. The court also declined to transfer the case to the Court of Appeals for the District of Columbia Circuit. *Id.* at 197a-205a.

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[2] The 2002 biennial review also addressed two other rules related to ownership of television stations. The Commission decided to retain its "dual network" rule, which prohibits mergers among the top-four broadcast television networks (ABC, NBC, CBS, and Fox). Pet. App. 610a-629a (Order ¶¶ 592-621). That decision was not challenged in the court of appeals. In addition, the Commission relaxed its national television ownership rule to allow common ownership of television stations that reach 45% (as opposed to the previous limit of 35%) of the national television audience. *Id.* at 552a-610a (Order ¶¶ 499-591). In 2004, while this case was pending before the court of appeals, Congress amended the 1996 Act to increase the national television audience reach limitation from 35% to 39%, and provided that rules relating to that limitation would no longer be subject to the biennial review process (which the statute changed to a quadrennial review). Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. B, § 629, 118 Stat. 99; see Pet. App. 36a-38a.

5. On June 24, 2004, the Third Circuit issued its decision on the merits. All three judges on the panel determined that the Commission's structural limits on broadcast ownership do not violate the First and Fifth Amendment rights of newspaper owners and broadcasters. Pet. App. 45a-48a.[3] The court stated that petitioners' First Amendment arguments were foreclosed by *NCCB*, in which this Court upheld the nationwide ban on newspaper-broadcast cross-ownership as "a reasonable means of promoting the public interest in diversified mass communications." *Id.* at 46a (quoting *NCCB*, 436 U.S. at 802). In addition, the court stated that, even if *NCCB* did not control, it would assess petitioners' First Amendment challenge under rational-basis review in light of the continuing physical scarcity of broadcast spectrum. *Id.* at 47a (explaining that regulation of use of broadcast spectrum is necessary because "many more people would like access to [broadcast spectrum] than can be accommodated").

Similarly, the court of appeals concluded that petitioners' equal protection claims were foreclosed by this Court's rejection in *NCCB* of an equal protection challenge to the newspaper-broadcast cross-ownership restriction. Pet. App. 45a-46a. The court added that the development of more media outlets since *NCCB* was not a basis for reaching a different result in this case. *Ibid.* The court likewise rejected petitioners' argument that the agency's statutory authority to adopt ownership limits was limited by Section 202(h) of the 1996 Act. *Id.* at 26a-36a; see *id.* at 124a (Scirica, J., dissenting) ("[T]he statute does not foreclose the possibil-

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[3] Although Chief Judge Scirica did not join the panel majority's analysis of the petitioners' constitutional claims, his conclusion that the Commission's ownership rules should have been affirmed is an implicit rejection of such claims. See Pet. App. 190a.

ity of increased regulation under the biennial review if the Commission finds such action in the public interest.").

a. In a portion of the panel opinion from which Chief Judge Scirica dissented, the court of appeals concluded that the Commission's cross-media rule and local television and radio rules should all be remanded for "additional justification or modification." Pet. App. 12a. For each of the three rules, the majority rejected the specific limits that the Commission had adopted (or, in the case of the local radio rule, retained). The majority emphasized that it was not passing final judgment on the ultimate permissibility of the particular ownership rules the Commission chose. Instead, the court stated, "the Commission gets another chance to justify its actions." *Id.* at 12a n.3.

Cross-Media Rule. The court of appeals concluded that the Commission's cross-media rule was not supported by a "reasoned analysis." Pet. App. 48a. The majority focused its criticism on the Commission's use of the Diversity Index to guide its judgment in setting ownership limits for local media markets of various sizes. In particular, the majority rejected the Commission's decision to evaluate diversity under the Diversity Index by assigning equal weight to "all outlets within the same media type (that is, television stations, daily papers, or radio stations)." *Id.* at 58a. In the majority's view, the equal share assignment "makes unrealistic assumptions about media outlets' relative contributions to viewpoint diversity in local markets." *Ibid.* The court also found the Diversity Index flawed because, in the view of the panel majority, it "gave too much weight to the Internet as a media outlet." *Id.* at 49a. Finally, the court stated that the Commission's cross-media rule did not rationally reflect the Diversity Index analysis because the rule "allow[ed] some combinations where the increases in Diversity Index scores were generally higher than for other combinations that were not allowed." *Id.* at 63a.

Local Television Ownership Rule. The court of appeals likewise remanded, for further consideration by the agency, the specific local television ownership limits that the Commission had adopted. Pet. App. 76a-77a. In constructing the local television rule, the Commission had begun with the goal of preserving six equal-sized competitors (see *id.* at 335a-336a (Order ¶ 192)), and, except for purposes of applying the top-four restriction (see p. 7, *supra*), it treated each television station in the market as having equal significance. *Id.* at 76a. In line with its analysis of the cross-media limits, the panel majority stated that in its view "no evidence" supported the Commission's equal weighting of local stations and further concluded that such weighting was unreasonable insofar as it allowed concentration—as measured by audience share—to exceed an HHI of 1800. *Id.* at 78a; see generally U.S. Dep't of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* § 1.5 (rev. Apr. 8, 1997) (*DOJ/FTC Merger Guidelines*) (designating markets with an HHI above 1800 as "highly concentrated"). The court therefore remanded the numerical limits for local television ownership "for the Commission to support and harmonize its rationale." Pet. App. 79a.

Local Radio Ownership Rule. The court upheld much of the Commission's approach to local radio ownership, including the Commission's decision to adopt a new methodology for delineating local radio markets, Pet. App. 90a, and to include noncommercial stations in local markets for purposes of applying the ownership rules, *id.* at 90a-91a. The court accepted that the Commission's use of numerical limits to prevent undue concentration of radio stations by a single party was "rational and in the public interest." *Id.* at 101a-102a.

The majority concluded, however, that the Commission's decision to retain the existing numerical limits—which the Commission had established at Congress's specific direction

in the 1996 Act—was not supported by "reasoned analysis." Pet. App. 102a. As with the other local ownership rules, the majority rejected the Commission's reliance on a benchmark that evaluated competition or diversity in terms of a number of outlets rather than audience shares. *Id.* at 104a-106a. In the majority's view, "[i]t defies logic to assume that a combination of top-ranked stations is the competitive equal to a combination of low-ranked stations just because the two combinations have the same number of stations." *Id.* at 104a.

b. Chief Judge Scirica dissented. In a comprehensive opinion, the Chief Judge emphasized that the majority had "substituted its own policy judgment for that of the * * * Commission." Pet. App. 107a-108a. Noting that "[i]t is not the role of the judiciary to second-guess the reasoned policy judgments of an administrative agency acting within the scope of its delegated authority," the Chief Judge explained in detail why he would have upheld the order on review, lifted the stay, and allowed the Commission's revised rules to go into effect. *Id.* at 108a.

6. In issuing its decision, the court of appeals extended the stay of the Commission's new broadcast ownership rules that it had issued before briefing and argument, "pending [its] review of the Commission's action on remand." Pet. App. 107a. On September 3, 2004, as part of its action on the government's petition for panel rehearing, the court partially lifted its stay to permit the Commission's revisions to its local radio ownership rules—which the court had largely upheld—to go into effect. *Id.* at 193a. The court denied the government's rehearing petition in other respects, however, and the cross-media limits and the local television ownership rules remain stayed by the court of appeals.

ARGUMENT

In Nos. 04-1020, 04-1033, 04-1036, and 04-1045, various industry parties make constitutional and statutory arguments that the Commission's broadcast ownership limitations must be subject to extraordinarily rigorous judicial scrutiny. As the government will explain in greater detail in its brief in opposition, the Court should deny those petitions. If, however, the Court were to grant the industry petitions, it should also grant this conditional cross-petition to review the court of appeals' conclusion that, under ordinary standards of judicial review of administrative action, the Commission failed to provide a reasoned analysis supporting the particular cross-media and local television and radio rules that it adopted. Otherwise, the Court's consideration of the industry petitioners' claims would require the Court to determine abstract constitutional (and statutory) questions without having before it any set of otherwise valid, concrete rules to which the desired higher standards of review could be applied.

A. The Petitions For Certiorari Do Not Warrant Review

1. Petitioners argue that the First and Fifth Amendments and Section 202(h) of the 1996 Act mandate heightened judicial scrutiny of the Commission's decision to continue to restrict broadcast station ownership.[4] The Third Circuit, however, correctly recognized the settled law that

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[4] Two of the petitions also discuss issues that are less directly related to the Commission's rationale for the ownership rules it adopted. In No. 04-1033, petitioner NAB argues (Pet. 19-25) that Section 202 of the 1996 Act, 110 Stat. 110, eliminated the Commission's authority to adopt revisions that have the effect of making its ownership rules more restrictive. In No. 04-1036, petitioner Tribune argues (Pet. 25-26) that the Third Circuit erred in maintaining the stay of the FCC's revised ownership rules pending the Commission's remand proceedings; the questions presented in No. 04-1036, however, do not expressly raise that issue, see *id.* at i.

the Commission's broadcast ownership regulations must be affirmed if they are "a reasonable means of promoting the public interest." Pet. App. 48a (citing *NCCB*, 436 U.S. at 796); see *id.* at 36a (stating that the Commission's rule revisions will be upheld if they are "in the public interest" and supported by "a reasoned analysis").

Petitioners' argument that the First Amendment compels heightened judicial scrutiny does not warrant review by this Court. The Court has spoken directly to that precise issue, making clear that as long as the Commission's licensing policies are designed to promote the public interest and are otherwise valid under the Communications Act, a decision to deny a license "is not a denial of free speech." *NBC*, 319 U.S. at 227. Petitioners do not suggest that there is any confusion in the lower courts about that rule. To the contrary, the D.C. and Third Circuits have both recently recognized and applied it. See, *e.g.*, Pet. App. 46a-48a; *Sinclair Broad. Group, Inc.* v. *FCC*, 284 F.3d 148, 167-169 (D.C. Cir. 2002). In any event, a licensing case such as this one does not present the question of the continuing validity of the "scarcity rationale" of *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), as applied to the regulation of the *content* of broadcast speech. Regardless of whether the reasoning of *Red Lion* remains appropriate in analyzing a regulation of the content of broadcast speech, such as the Commission's former "fairness doctrine,"[5] the Commission's ownership regulations have consistently been regarded as content-neutral applications of the Commission's licensing authority.[6] The

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[5] The Commission repealed the fairness doctrine in 1987. See *In re Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987), aff'd, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990).

[6] See *NBC*, 319 U.S. at 226; *NCCB*, 436 U.S. at 775; see also *Fox Television Stations, Inc.* v. *FCC*, 280 F.3d 1027, 1046 (D.C. Cir. 2002) (stating that ownership regulations are not "content-based regulation" of speech); *Telecommunications Research & Action Ctr.* v. *FCC*, 801 F.2d

courts of appeals have not reached divergent views on the level of scrutiny that should apply in this context, and this Court's precedents do not suggest a need for revisiting that settled question.

Nor is further review warranted with respect to petitioners' argument that the cross-media rule unconstitutionally singles out newspaper owners, in violation of due process and equal protection principles, without limiting owners of cable television systems, Internet websites, or other information-delivery technologies. See 04-1020 Pet. 23-25; 04-1036 Pet. 19-24. Petitioners overlook that "the fact that a law singles out a certain medium" for different treatment by itself does not establish a constitutional concern. *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622, 660 (1994) (citing *Leathers* v. *Medlock*, 499 U.S. 439 (1991)). Rather, such distinctions are permitted where "'justified by some special characteristic of' the particular medium being regulated." *Turner*, 512 U.S. at 662 (quoting *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983)). Here, the Commission found that "broadcast television, daily newspapers, and broadcast radio are the three media platforms that Americans turn to most often for local news and information." Pet. App. 520a (Order ¶ 452). It was appropriate, therefore, for the Commission to focus its rule on those "most widely utilized media sources," while avoiding unnecessary regulation of other industries. See *NCCB*, 436 U.S. at 815 (upholding reasonableness of

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501, 506 n.2 (D.C. Cir. 1986) (observing that, while *NBC* upheld the government's authority to adopt licensing policies, *Red Lion* was the first instance in which the Court addressed "whether the scarcity doctrine could justify regulation of the content of broadcasts"); cf. *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622, 643 (1994) ("laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral").

Commission's decision to require divestiture of newspaper-broadcast combinations in small markets).

Finally, petitioners' statutory argument (04-1033 Pet. 29; 04-1036 Pet. 24-25; 04-1045 Pet. 19-22) that Section 202(h) of the 1996 Act compels heightened scrutiny of the Commission's ownership regulations does not warrant this Court's review. Contrary to petitioners' suggestion (04-1033 Pet. 24, 29; 04-1036 Pet. 25; 04-1045 Pet. 19-20), the Third Circuit's interpretation of Section 202(h) does not conflict with the D.C. Circuit's decisions in *Fox Televsions Stations, Inc.* v. *FCC*, 280 F.3d 1027 (2002), and *Sinclair*. In *Fox*, the D.C. Circuit interpreted Section 202(h) to require the Commission, if it decides to retain a particular ownership rule, to provide an adequate explanation for its decision.[7] See 280 F.3d at 1042, 1044. Likewise, the court in *Sinclair* concluded that the Commission "has wide discretion to determine where to draw administrative lines," 284 F.3d at 162 (internal quotation marks omitted), but that the Commission must "provide a reasoned explanation for its action," *ibid.* The Third Circuit articulated the same standard in this case. See Pet. App. 34a-36a (stating that the Commission's decision to

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[7] The *Fox* panel initially interpreted the phrase "necessary in the public interest" in Section 202(h) to mean that a "regulation should be retained only insofar as it is necessary in, and not merely consonant with, the public interest." 280 F.3d at 1050. On rehearing, the panel modified its decision to leave open the question of the standard that the Commission must meet under section 202(h). *Fox Television Stations, Inc.* v. *FCC*, 293 F.3d 537, 541 (D.C. Cir. 2002). In *Cellco Partnership* v. *FCC*, 357 F.3d 88, 98 (2004), the D.C. Circuit subsequently held that the Commission reasonably interpreted similar language in Section 11 of the Communications Act, 47 U.S.C. 161, to require only that it "reevaluate regulations in light of current competitive market conditions to see that the conclusion [it] reached in adopting the rule—that [the rule] was needed to further the public interest—remains valid." The court of appeals in this case applied *Cellco's* interpretation of Section 11 to Section 202(h). Pet. App. 28a-33a.

retain, modify, or repeal an ownership rule must be supported by a "reasoned analysis" and that a rule must be "vacated or modified" if the Commission concludes that it is no longer "useful").[8]

2. Even if petitioners had raised issues that might warrant this Court's consideration in a different context, this case is in an interlocutory posture and does not provide an appropriate vehicle for doing so. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (declining to exercise certiorari jurisdiction where the court of appeals had remanded the case); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J.); see generally R. Stern et al., *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002).

The Third Circuit did not *uphold* the new broadcast ownership rules that petitioners challenged; the court instead *rejected* aspects of the Commission's explanations of those rules and generally stayed the rules' effectiveness pending reconsideration by the agency on remand. Thus, in the current posture of this case, there is an unreversed

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[8] In 04-1045, petitioners argue (Pet. 23-25) that the court of appeals' application of traditional principles of deferential review should have led the court to affirm the Commission's decision in this case. Although the government agrees with that conclusion for the reasons stated below, that claim of error consists of the "misapplication of a properly stated rule of law," and therefore does not, by itself, warrant exercise of this Court's certiorari jurisdiction. See Sup. Ct. R. 10. As explained herein, however, if the Court decides to grant the petition in No. 04-1045, or any of the other petitions, it should consider the questions raised in this conditional cross-petition together with its consideration of the questions presented in such petitions. Indeed, grant of this conditional cross-petition would be particularly warranted if the Court were to grant the petition in No. 04-1045 because, while the legal errors addressed in that petition and the instant cross-petition are fundamentally the same, petitioners in No. 04-1045 are concerned only with the cross-media rule that affects newspaper interests, whereas the instant cross-petition covers the local television and radio rules as well.

determination that, regardless of any higher level of constitutional scrutiny that may be applicable, the Commission failed to justify adequately its new rules under ordinary standards applicable to judicial review of administrative action. That determination is sufficient to preclude application of the new rules, pending the Commission's remand proceedings. As to the old broadcast ownership rules, although they are now back in force due to the Third Circuit's stay of the Commission's new rules, they are not being challenged in this ongoing proceeding, and, in any event, they are likely to be changed as the result of the remand proceedings. Petitioners' constitutional challenges are therefore in effect directed to whatever future rules the Commission may choose to issue in its remand proceeding—not to any concrete rules that exist today.

This Court has long emphasized the undesirability of deciding pure questions of constitutional law, removed from a specific application of the constitutional rule to a particular government action. General prudential considerations counsel against unnecessary pronouncements on constitutional matters; without a concrete application of the constitutional standard to a particular governmental action or rule, the Court cannot be certain that resolution of a constitutional issue is necessary.[9] The Court's reluctance to entertain pure issues of constitutional law is also based on the benefits to the Court's decisionmaking process of the context provided by a particular concrete dispute; such a context is likely to help focus the Court's attention on important aspects of the

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[9] See, e.g., *Spector Motor Serv.* v. *McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable."); see also *Minnick* v. *California Dep't of Corrections*, 452 U.S. 105, 122 n.30 (1981); *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-569 (1947).

legal problem and on consequences of the Court's decision that might otherwise be obscured. Because "all contingencies of attempted enforcement cannot be envisioned in advance of those applications," this Court has "found it wiser to delay passing upon the constitutionality" of a statute or regulation "until faced with cases involving particular provisions as specifically applied to persons who claim to be injured." *Watson* v. *Buck*, 313 U.S. 387 (1941).

Because the old ownership rules are not at issue in this case and the court of appeals' conclusion precludes enforcement of the new ones in any event, granting further review of the constitutional questions in this case would in effect present the Court with the need to resolve abstract constitutional questions outside a specific factual and regulatory setting. Rather than entertaining such a speculative challenge to possible future agency action, the Court should deny review in this case and allow the Commission to decide, on remand, what broadcast ownership rules are appropriate and why they are justified.

B. If One Or More Of The Petitions Are Nonetheless Granted, The Cross-Petition Should Also Be Granted So That The Court Is Not Compelled To Address Petitioners' Claims In The Abstract

If the Court nonetheless were to grant review in this case, the Court should grant review of this cross-petition as well, thereby bringing before the Court the validity of the Commission's new rules. The Court would thus have an opportunity to consider petitioners' arguments for more stringent review of broadcast ownership rules in the concrete context of the particular rules (and rationales) adopted by the Commission. That approach would allow the Court to consider the antecedent issue of the validity of those rules under the ordinary procedural requirements of the Administrative Procedure Act (APA), 5 U.S.C. 706(2), before being

required to consider a new constitutional standard.[10] This Court has consistently followed the practice of considering statutory issues before constitutional challenges in adjudicating the validity of the Commission's ownership rules in the past. See *NCCB*, 436 U.S. at 793 ("We turn first to the statutory, and then to the constitutional, issues."); *NBC*, 319 U.S. at 226 ("We come, finally, to an appeal to the First Amendment."). If the Court determines that further review is warranted at all in this case, it should follow the same course here.

Although the question whether the Commission adequately supported its revisions to its broadcast ownership rules is complex and specific to the facts of this case, granting further review on the questions presented in any of the petitions would likely require detailed consideration of much of the Commission's reasoning in the decision under review in any event. Petitioners themselves invoke the Commission's findings and conclusions to support their various constitutional and statutory arguments, see, *e.g.*, 04-1020 Pet. 18; 04-1033 Pet. 26-27; 04-1036 Pet. 16-18, and the government's merits brief likewise would necessarily involve reference to the Commission's analysis in the order under review. Given the detailed examination of the Commission's order that would be required to address petitioners' various constitutional and statutory arguments, there are no practical reasons to refuse to consider, as well, the related (and logically prior) question of whether the challenged regulations are supported by a reasoned analysis.

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[10] Those same considerations apply *a fortiori* to petitioners' arguments that Section 202(h) requires heightened scrutiny of the Commission's broadcast ownership regulations. The Court should not consider whether the challenged rules survive any heightened scrutiny that would be applicable under Section 202(h) while leaving unreviewed the court of appeals' conclusion that the rules failed to survive the more deferential review normally applicable under the APA.

C. The Court Of Appeals Erred In Concluding That The Specific Radio- And Television-Licensing Rules The Commission Adopted Were Inadequately Supported

The Communications Act vests in the Commission the exclusive authority to define and promote "the public interest, convenience, and necessity" in the broadcast field, see, *e.g.*, 47 U.S.C. 309(a), 310(d), and "[i]t is not for [reviewing courts] to say that the 'public interest' will be furthered or retarded" by the specific means that the Commission has chosen to carry out its statutory duties. *NBC*, 319 U.S. at 224. Rather, judicial review of the Commission's exercise of delegated authority must accord with traditional administrative law principles, which preclude a court from "substitut[ing] its judgment for that of the agency." *Motor Vehicles Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In reviewing the Commission's decision, the court of appeals was required to defer to the agency's rational policy choices and uphold the modified rules so long as they were "based on consideration of permissible factors and * * * otherwise reasonable." *NCCB*, 436 U.S. at 793. In crucial respects, however, the court erred in disregarding its obligation to uphold the Commission's reasoned decisions.

1. *Equal weighting.* The Commission's broadcast ownership rules are grounded in the longstanding policy of licensing broadcast radio and television stations in a manner that promotes rather than undermines media diversity and competition, and encourages broadcast television and radio stations to be "responsive to the needs and interests of their local communities." Pet. App. 219a, 248a (Order ¶¶ 17, 74). In the order under review, the Commission decided (with limited exceptions) to craft its broadcast ownership rules so that broadcast outlets of the same type are treated equally for purposes of applying the rules, rather than differently in accordance with their share of the audience or operations at

a particular moment in time. See, *e.g.*, Pet. App. 356a-357a, 412a-413a, 501a-503a (Order ¶¶ 219, 300, 423-425).

The Commission explained that its choice to give equal weight to each broadcast outlet of a particular type was supported by several rationales.[11] As the Commission observed, "current market shares (*e.g.*, of viewing or listening) may not be good predictors of future behavior," because broadcast outlets can rapidly "change the amount of news and current affairs that they offer, perhaps in response to competitive conditions in the 'viewpoint diversity' marketplace." Pet. App. 501a-502a (Order ¶ 423). The Commission further explained that applying a market-share test sensibly to particular transactions in the broadcast industry would require difficult and contentious case-specific analyses which, among other things, could require first determining which programs are properly classified as offering news and public affairs and then determining their share of the audience. Such an approach could present its own "legal/ constitutional and data collection" problems, foster uncertainty about the Commission's ultimate decision, and raise transaction costs. *Id.* at 502a-503a (Order ¶ 424); see *id.* at 251a-255a (Order ¶¶ 80-85). The Commission noted that attempting to mitigate those concerns by imposing a bright-line ownership cap based on market shares might cause equal harm if it "discourag[ed] * * * firms from earning market share through

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[11] The Commission did not apply its approach indiscriminately. For instance, the Commission concluded that structural conditions in the television market (*i.e.*, the longstanding presence of four dominant television networks) warranted a prohibition on consolidating the top-four-ranked television stations in local markets (Pet. App. 337a-343a (Order ¶¶ 195-200)) and the top-four television networks, *id.* at 628a-629a (Order ¶¶ 621). The Commission particularly noted that new television networks face significant obstacles to competing with the top-four television networks, and those obstacles protect the dominant position of the top-four television stations in local markets. *Id.* at 338a-339a, 619a-622a (Order ¶¶ 196, 607-610).

investment in quality programming," *id.* at 413a (Order ¶ 300), or it could ultimately lead to excessive concentration by permitting consolidation of "a large number of stations with low audience share," *id.* at 357a (Order ¶ 219). Finally, an "equal share" approach reflects the "[u]ltimate[] * * * goal" of "ensur[ing] that a wide range of viewpoints have an *opportunity* to reach the public," rather than ensuring that the public will choose to tune in to any particular viewpoint in large numbers. *Id.* at 503a (Order ¶ 425) (emphasis added).[12]

Although the court of appeals paid lip service to the principle of deferential review of agency policy choices, see Pet. App. 24a-26a, 36a, the court in fact departed from that standard most clearly in its rejection of the Commission's determination to give equal weight to outlets within the same medium. The court below remanded the three local ownership rules because, in the majority's view, they each suffer from "the same essential flaw: an unjustified assumption that media outlets of the same type make an equal contribution to diversity and competition in local markets." *Id.* at 107a. The Commission, however, made a reasoned policy decision that focusing on the potential impact of like outlets, rather than their individual market shares at a particular moment in time, would better promote the agency's public interest goals of ensuring the *availability* of diverse viewpoints, fostering certainty, encouraging investment in

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[12] It is well established that the Commission's regulation of broadcast license ownership confers no antitrust immunity. See *United States* v. *Radio Corp. of Am.*, 358 U.S. 334, 346 (1959); see also 1996 Act § 601(b), 110 Stat. 143 (the 1996 Act does not "modify, impair, or supersede the applicability of any of the antitrust laws"); Pet. App. 348a, 439a-440a (Order ¶¶ 208, 339). The Department of Justice reviews broadcast mergers under the antitrust laws. The standards of the antitrust laws are distinct from those of the Communications Act, and their application may lead to different conclusions.

quality programming to increase market share, and avoiding the long-term risks of permitting consolidation of a large number of stations that begin with low market share. The panel majority below failed to evaluate, much less give deference to, those rationales. See, *e.g.*, Pet. App. 79a (stating that "no reasonable explanation underlies [the Commission's] decision to disregard actual market share" in local television rule); *id.* at 105a (stating that the Commission did not explain "why it could not take actual market share into account when deriving the numerical limits").

The panel majority did take issue with the Commission's judgment that current market shares are poor indicators of future market conditions. The Commission reasoned that, given the relatively low marginal cost of altering their programming, media outlets can quickly appeal to new markets and provide opportunity for expression of different viewpoints. In the majority's view, that rationale was insufficient because the Commission did "not provide any evidence that media outlets "*actually undergo* * * * radical content change" on a regular basis. See, *e.g.*, Pet. App. 60a. When an agency's decision is "primarily of a judgmental or predictive nature," however, "complete factual support in the record * * * is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'" *NCCB*, 436 U.S. at 813-814. The Commission's judgment that its licensees will be able to change their operations in response to changes in market or regulatory conditions should have been upheld as a reasonable exercise of the agency's expert predictive judgment.

2. *The Internet's contributions to diversity.* The Commission rejected arguments that it should discount the Internet's contribution to local diversity based on statistics about historical usage of that emerging communications

medium. Explaining that the "availability of media, not the popularity of specific * * * websites" at any particular moment, is the critical focus of the agency's analysis, the Commission determined that the "virtual universe of information sources on the Internet" should be included as part of the "diversity mix." Pet. App. 505a (Order ¶ 427). Thus, the Commission concluded that its rules should focus on the post-combination competitive *potential* of proposed media combinations, rather than their pre-combination market shares.

The panel majority exceeded its proper role in rejecting the Commission's analysis of the Internet's contribution to diversity in local media markets. According to the majority, the Commission gave the Internet "too much weight" in the Diversity Index. Pet. App. 49a. Although the weight that the Commission assigned to the Internet was based on evidence of consumers' reliance on Internet-delivered news and current affairs information, see *id.* at 486a-487a (Order ¶ 402), the court of appeals concluded that the Commission should have found that evidence unreliable because the consumer survey "did not identify which websites respondents used as sources of local news." *Id.* at 54a.

There is no objective basis for the panel majority's rejection of the weight that the Commission assigned to the Internet. Rather, much like its rejection of the Commission's equal-weighting approach, the majority disregarded the Commission's expert judgment that the relative significance of the Internet as a communications medium should be determined primarily by the capability of that medium to make a "virtual universe of information" available to consumers, and not by the "popularity of specific * * * websites" at a particular moment in time.[13] Pet. App. 505a

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[13] The panel majority analogized its analysis of the Internet to the Commission's decision in the order under review to attach lesser weight to

(Order ¶ 427). As Chief Judge Scirica observed, because "the Internet is unconstrained and provides a forum for a limitless number of voices and viewpoints," the "FCC acted reasonably in counting the Internet as a significant addition to the [traditional] media marketplace." *Id.* at 167a-168a.

The panel majority opined that much of the information on the Internet has an "entirely different character" from traditional media outlets and "thus contribute[s] to viewpoint diversity in an entirely different way." Pet. App. 56a. In reaching that conclusion, the two judges in the majority acted based upon their own view that "the media provides (to different degrees, depending on the outlet) accuracy and depth in local news," whereas other Internet users—including "political candidates" and "local governments"—are not "media outlets for viewpoint-diversity purposes" because they merely "use the Internet to disseminate information and opinion about matters of local concern." *Id.* at 56a-57a. Different media no doubt have different characteristics and contribute to diversity in different ways. But the Commission acted reasonably in concluding that the wide array of information and opinion on the Internet should be taken into

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cable television because of doubts about the contribution of cable systems to local news and public affairs programming. Pet. App. 52a-53a. The analogy is inapt. All programming available over a cable television system is generally either under the control of the cable operator or consists of the mere retransmission of over-the-air broadcast television channels. The question for the Commission was whether there was reliable record evidence on the degree to which cable operators contribute to local diversity. The Commission concluded that there was insufficient evidence to make that determination. *Id.* at 493a-495a (Order ¶¶ 412-414). In contrast, Internet web sites generally are not under the control of a single entity. With respect to the Internet, therefore, the pertinent question was whether the Internet medium is capable of contributing to diversity in local markets. Because diverse providers of information have *access* to the Internet, it is not sufficient, as the panel majority suggests, to determine the percentage of websites on the Internet that presently are sources of local news and public affairs information.

account in determining the viewpoint diversity available in a given community. The panel majority's conclusion to the contrary amounted to a policy judgment about the types of diversity that should be fostered; that, however, is a policy "choice properly within the purview of the Agency." Pet. App. 165a-166a (Scirica, C.J., dissenting).

3. *Line-drawing.* Finally, although the panel majority said that "[d]eference to the Commission's judgment is highest when assessing the rationality of the agency's line-drawing endeavors," Pet. App. 62a, the court rejected several of the Commission's line-drawing determinations without evaluating the substance of the Commission's reasoning. For instance, the court stated that the cross-media rules inconsistently permitted combinations that the Diversity Index analysis had suggested were more harmful than other types of cross-media combinations that were prohibited. The Commission explained, however, that it did not develop the Diversity Index "with the idea of slavishly following the numbers, * * * but [only] to confirm and support [its] judgments * * * regarding the kinds of markets that are most susceptible to viewpoint concentration, and the kinds of transactions that are most likely to have a significant impact on the level of diversity available in any given market." *Id.* at 533a (Order ¶ 471).

Likewise, rather than deferring to the Commission's decision to retain the limits on local radio ownership that the Telecommunications Act instructed the Commission to adopt, the majority stated that the Commission's decision was not "justified by a reasonable explanation" because of a modest perceived inconsistency with the *DOJ/FTC Merger Guidelines.* Pet. App. 103a & n.77.[14] All line drawing is to

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[14] The majority indicated that the perceived conflict with the *DOJ/FTC Merger Guidelines* was relevant because the Commission had analogized to the benchmarks in the *DOJ/FTC Merger Guidelines* in developing the

some extent arbitrary, and it is not likely that the Commission could ever identify an absolute line dividing permissible from impermissible combinations without the possibility of drawing the line in a slightly more permissive or more restrictive manner. *Barnhart* v. *Thomas*, 540 U.S. 20, 29 (2003) ("To generalize is to be imprecise. Virtually every legal (or other) rule has imperfect applications in particular circumstances."). So long as a court may assure itself that the Commission's rules generally track its rationale with reasonable clarity—as the Commission's rules do here—the court's role is at an end. The Commission's broadcast ownership rules should have been affirmed.

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limits in the local television ownership rule. See Pet. App. 103a. The Commission explained in the television context, however, that it had no intention of deriving its media ownership rules from "a strict * * * application" of the *DOJ/FTC Merger Guidelines*. *Id.* at 336a (Order ¶ 193); see *id.* at 503a (Order ¶ 425). Indeed, given that the panel majority elsewhere recognized that "[n]o reason exists * * * for the Commission's local television ownership limits to mirror precisely its local radio ownership limits," the majority's decision to require the Commission to explain its local radio limits with reference to the *DOJ/FTC Merger Guidelines* is particularly unwarranted. *Id.* at 77a n.52.

CONCLUSION

If the Court grants one or more of the petitions for a writ of certiorari in Nos. 04-1020, 04-1033, 04-1036 and 04-1045, this cross-petition for a writ of certiorari should also be granted.

Respectfully submitted.

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APPENDIX

STATUTORY PROVISIONS INVOLVED

1. Section 202 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 110, provides, in relevant part:

BROADCAST OWNERSHIP.

* * * * *

(b) LOCAL RADIO DIVERSITY.—

(1) APPLICABLE CAPS.—The Commission shall revise section 73.3555(a) of its regulations (47 C.F.R. 73.3555) to provide that—

(A) in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM);

(B) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);

(C) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and

(D) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.

(2) EXCEPTION.—Notwithstanding any limitation authorized by this subsection, the Commission may permit a person

or entity to own, operate, or control, or have a cognizable interest in, radio broadcast stations if the Commission determines that such ownership, operation, control, or interest will result in an increase in the number of radio broadcast stations in operation.

* * * * *

(h) FURTHER COMMISSION REVIEW.—The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

2. Section 301 of Title 47 of the United States Code provides:

License for radio communication or transmission of energy

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or

(c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States (except as provided in section 303(t) of this title); or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

3. Section 309(a) of Title 47 of the United States Code provides:

Application for license

(a) Considerations in granting application

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

4. Section 310(d) of Title 47 of the United States Code provides:

License ownership restrictions

* * * * *

(d) Assignment and transfer of construction permit or station license

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

(2)

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IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,

v.

PROMETHEUS RADIO PROJECT, *et al.*,
Respondents.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONSE OF THE NATIONAL ASSOCIATION OF BROADCASTERS TO THE FEDERAL COMMUNICATIONS COMMISSION'S CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the Federal Communications Commission's modifications to its regulations regarding local radio and local television ownership were not supported by reasoned analysis.

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STATEMENT

The Federal Communications Commission's conditional cross-petition challenges the Third Circuit's conclusion that, under ordinary standards governing judicial review of administrative action, the FCC failed to justify certain aspects of its new broadcast rules governing ownership of local television and local radio stations. The arguments set forth in the FCC's filing vividly illustrate the extent of the Third Circuit's effort to arrogate to itself the right to set media ownership policy. *See* FCC Cross-Petition 21-28; NAB Petition (04-1033) 19-29. The National Association of Broadcasters ("NAB") thus does not oppose granting the FCC's conditional cross-petition.

NAB disagrees with the remainder of the Commission's contentions. In particular, as will be developed more in NAB's reply brief to be filed in 04-1033, the FCC has provided no compelling reason for denying NAB's petition. The defiance by the FCC and the Third Circuit of the judgments made by Congress in the Telecommunications Act of 1996, Pub. L. No. 104-104, § 202, 110 Stat. 56 ("1996 Act"), merit this Court's attention, particularly in light of the contrary approach taken by the D.C. Circuit. Moreover, the rules that are the subject of NAB's petition are already in effect and are largely unaffected by the Third Circuit's remand, and thus the posture of the case counsels in favor of immediate review, not against it. Finally, NAB's petition should be granted irrespective of whether the Court believes the issues raised in the FCC's cross-petition warrant review.

RESPONSE TO CONDITIONAL CROSS-PETITION[1]

NAB's petition challenges two aspects of the decision below: first, the Third Circuit's approval of changes to the FCC's local radio rules that forbid the common ownership and transfer of stations that would be permissible under the ownership levels established by Congress in the 1996 Act; and second, the decision to uphold the FCC's retention of a "top-4" television duopoly restriction, which forbids or sharply limits common ownership in many local television markets, including small and medium-sized markets where the benefits of common ownership are most needed. Each of these issues merits this Court's review now, quite apart from whether the Court believes that the FCC's conditional cross-petition should be granted.

I. NAB's Petition Warrants Review.

Presaging arguments that it promises to develop more fully in its brief in opposition, the FCC argues that all of the petitions challenging the Third Circuit's decision should be denied. In particular, the Commission contends that the D.C. Circuit and the Third Circuit applied "the same standard" concerning the scope of the deregulatory mandate set forth in § 202(h) of the 1996 Act, FCC Cross-Petition 16, and that the petitions should be denied in any event because the case is in "an interlocutory posture," *id.* at 17.[2] Insofar as those arguments relate to NAB's petition, they are meritless.

1. The Third Circuit's refusal to read § 202 as a whole as placing any deregulatory "thumb on the scale" in connection

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[1] The background to the FCC's cross-petition has been set forth at length in NAB's petition in 04-1033, *see* NAB Petition 2-12, as well as in the other filings arising from the Third Circuit's decision below, and will not be repeated here.

[2] The Commission also addresses the constitutional arguments presented in the petitions filed by Media General (04-1020), the Tribune Co. (04-1036), and the Newspaper Association of America (04-1045). The arguments raised are beyond the scope of this opposition.

with the FCC's § 202(h) review of broadcast ownership restrictions warrants this Court's review.

The FCC argues first that the Third Circuit applied "the same standard" in this case that the D.C. Circuit applied in *Fox* and *Sinclair*. No reasonable reader of *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir.), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002), and *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002), however, could believe that the D.C. Circuit and the Third Circuit were applying the same standard. The D.C. Circuit in both *Fox* and *Sinclair* reviewed the Commission's rules with a skeptical eye to ensure that they were consistent with § 202's deregulatory mandate, and the court struck down all of the challenged regulations on the ground that the Commission had failed to explain why further deregulation was not proper. *See, e.g.*, *Fox*, 280 F.3d at 1040-45, 1049-52; *Sinclair*, 284 F.3d at 159, 162-65. In contrast, the Third Circuit analyzed the FCC's order to ensure that it was not too deregulatory, demanding further explanation of how the adopted level of deregulation could be justified. Indeed, the Third Circuit chastised the FCC for failing to justify the deregulatory consequences of the Commission's decision to retain numerical station ownership limits established by Congress, Pet. App. 102a-106a, and it upheld even regulations that were more restrictive of common ownership than the floors that Congress had set in the 1996 Act, *id.* at 85a-90a.[3] The notion that the two courts were applying the same standard is not plausible.

Despite the blithe assertion by the FCC that the standards are the "same," there is little doubt that the "citizen petitioners" believed the D.C. Circuit had acknowledged the deregulatory mandate of the statute. Thus, when the media petitioners filed petitions for review in the D.C. Circuit, the

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[3] All appendix cites in this response are to the Petitioners Appendix in *Media General, Inc. v. FCC*, 04-1020.

citizen petitioners filed in the Second Circuit, the Third Circuit, and the Ninth Circuit in an effort (successful, as it happened) to obtain by appellate lottery a more favorable forum, and they actively opposed the efforts of the media petitioners and the FCC to transfer the case to the D.C. Circuit.

Moreover, even if the D.C. Circuit and the Third Circuit had applied "the same standard," the granting of NAB's petition is warranted. This Court has previously granted review without a split in cases presenting similar issues, including broadcast ownership cases and cases arising out of the 1996 Act. *See* NAB Petition 16-17. The media ownership rules at issue here are among the most important issues the Commission faces, as both the scope of and interest in the FCC's proceedings below make clear. The public interest plainly singles this case out as one worthy of this Court's attention, with or without a split.

Waiting for other courts to weigh in on the issues presented is particularly inappropriate here because, in an extraordinary action, the Third Circuit has expressly retained jurisdiction to review the FCC's order on remand. Pet. App. 12a & n.3. That is troubling because the Third Circuit's approach interprets § 202(h) as though unaffected by the rest of § 202. Section 202(h), however, is not a freestanding provision. It is instead an integral part of a provision, *every other part of which* is indisputably deregulatory. Indeed, virtually every subsection of § 202 reverses specific FCC ownership restrictions, many of which had reflected FCC policy for decades, in an effort to *expand* common ownership. To read § 202(h) as the Third Circuit did as merely the congressional equivalent of "same old, same old" cannot be squared with any reasonable approach to statutory interpretation.

This is especially the case with respect to NAB's challenge to the Third Circuit's treatment of the local radio

ownership rules, which turns on the construction of § 202 as a whole, not just § 202(h). Indeed, the core of NAB's position on local radio ownership is that the Commission's decision to go below the ownership floors set by Congress expressly in the 1996 Act violates both § 202(b) – which established those floors – and § 202(h). Nothing in the Commission's § 202(h) discussion thus provides a reason to deny that aspect of NAB's petition – as the Commission appears to recognize. *See* FCC Cross-Petition 13 n.4.

2. The Commission's alternative argument that the case is in "an interlocutory posture" similarly provides no basis for denying review. It is now nearly 10 years since Congress passed the 1996 Act to relax ownership restrictions in the multibillion dollar media industry, and there is *still* no settled understanding of the basic standards that govern the Commission's proceedings. The D.C. Circuit has characterized § 202(h) as embodying a deregulatory mandate akin to "Farragut's order at the battle of Mobile Bay ('Damn the torpedoes! Full speed ahead.')," *Fox*, 280 F.3d at 1044; the Third Circuit has interpreted § 202(h) as merely restating the usual deferential standards of administrative review, *see* Pet. App. 35a-36a. Moreover, it remains unclear whether § 202 as a whole permits the FCC to restrict common ownership below the floors set in the 1996 Act (as the Commission did here) or even (as the Commission apparently believes) to restore national ownership limits that the 1996 Act specifically abolished.

Waiting for further proceedings perpetuates this uncertainty. The FCC's early revisions of the ownership rules in response to the 1996 Act were vacated or remanded by the D.C. Circuit in *Fox* and *Sinclair* as insufficiently deregulatory; its subsequent efforts to remedy the D.C. Circuit's concerns were viewed by the Third Circuit as too deregulatory. Although the Commission may be willing to tolerate this state of affairs, it is the broadcasters and the

listeners and viewers they serve that suffer the consequences. The propriety of investments worth millions or even hundreds of millions of dollars are uncertain, and all the more so because the FCC has now imposed transfer restrictions even on station combinations that were properly formed under the ownership levels established by Congress in 1996. Common ownership that would have been permissible under a proper implementation of the 1996 Act and that would strengthen broadcasters and improve service to the public is thus deterred or precluded entirely. The Commission's suggestion that review should be delayed indefinitely so that the Commission and the Third Circuit can have yet another crack at the statute thus has little to recommend it.

Denying review on the ground that the case is interlocutory is particularly inappropriate with respect to the issues raised in NAB's petition. Unlike most of the new rules under consideration (which were stayed by the Third Circuit), the FCC rules challenged by NAB are fully in effect. The Third Circuit granted the FCC's request that the revised and more restrictive radio rules be exempted from the Third Circuit's general stay of the new media ownership regulations. And the top-4 television duopoly restriction is in place because the Third Circuit ordered the FCC to reinstate the very rule – containing that top-4 restriction – that the D.C. Circuit remanded as arbitrary and capricious in *Sinclair*. The exact restrictions challenged in NAB's petition are thus currently operating to prevent beneficial common ownership.

In any event, the Commission's interlocutory arguments are especially misplaced in the context of this case. With respect to the radio rules, for example, the Commission successfully sought specific relief from the Third Circuit's stay order so that the Commission could implement immediately the new local radio restrictions. For the Commission to claim now that review of these rules should

be further delayed because the order is interlocutory smacks of a bait and switch.

The situation is even more egregious with respect to the local television rule. The duopoly rule now in place is the very rule that the D.C. Circuit remanded as inconsistent with the 1996 Act in *Sinclair*. Further delay thus preserves a rule that was called into question three years ago.

It is thus misleading for the Commission to suggest that although the "old broadcast ownership rules . . . are now back in force due to the Third Circuit's stay of the Commission's new rules," those old rules "are not being challenged in this ongoing proceeding." FCC Cross-Petition 18; *id.* at 19. In fact, as discussed above, the "new" local radio rules described in NAB's petition *are* in effect and *are* being challenged in this proceeding. And the only reason the "old" local television rules are not being challenged is because those rules *have already been remanded* to the Commission by the D.C. Circuit.

Nor is it correct that these rules are "likely to be changed as the result of the remand proceedings." FCC Cross-Petition 18. The Commission reimposed the top-4 restriction after the D.C. Circuit in *Sinclair* struck down a television duopoly rule that contained the same provision; the Commission surely has little incentive to eliminate that rule now that the Third Circuit has explicitly blessed it. And it is unlikely that the Commission will alter its new method of defining radio markets or its transferability restrictions in light of the Commission's request for relief from the Third Circuit's stay precisely so that those new provisions could take effect immediately.

In short, the Court has before it one of the most hotly contested proceedings in recent memory. All segments of the industry participated, as did tens of thousands of individuals. In response to prior concerns expressed by the D.C. Circuit,

the FCC developed as extensive a record as possible, and all interested parties had the chance to place in the record the facts they found most persuasive. The Commission itself then gave full consideration to the issues in a lengthy order. Little is to be accomplished by waiting for further proceedings. If ever a Commission order were ripe for review, it is this one.

II. The Court Need Not Grant The Commission's Conditional Cross-Petition In Order To Consider Fully The Issues In NAB's Petition.

1. The Third Circuit's decision reflects a hostility to deregulation and media ownership reform that the record does not warrant and that Congress did not share. As Chief Judge Scirica explained, the Third Circuit panel majority repeatedly substituted its judgment for that of the expert agency, particularly with respect to challenges that the FCC had allowed too much deregulation. The Third Circuit's decision thus cannot be squared with traditional principles of administrative law, much less the deregulatory mandate contained in § 202(h), as the FCC demonstrates in its conditional cross-petition.

NAB agrees, for example, that the Third Circuit's distrust of deregulatory policies enacted by Congress and pursued by the Commission led it to question the FCC's "line-drawing" to an extent that is inconsistent with traditional principles of judicial review. FCC Cross-Petition 27-28. *See generally Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-44 (1983); *National Broad. Co v. United States*, 319 U.S. 190, 224 (1943).

With respect to both the local radio rules and the local television rules, the panel majority remanded the numeric limits adopted by the FCC, largely because it viewed the resulting markets as too concentrated. The majority took the FCC to task with respect to the local television rules, for

instance, because the Commission failed to "ensure that markets would not exceed the Merger Guidelines' 1800 threshold for highly concentrated markets." Pet. App. 78a. And it likewise faulted the Commission's local radio limits – the very limits established by Congress – because they permitted markets with HHI concentrations "well above the Merger Guidelines' 1800 threshold for highly concentrated markets." *Id.* at 105a. Thus, despite the fact that the Commission expressly stated that it sought to avoid a "mechanical application of the DOJ/FTC Merger Guidelines," *id.* at 78a, and despite the FCC's statement (approved by the Third Circuit) that the FCC sought to consider a range of factors outside the scope of those relevant to the antitrust agencies, *id.* at 68a, the panel majority remanded the lines selected by the Commission because they resulted in concentration levels that the Third Circuit viewed as too high. *Cf.* Pet. App. 179a-190a (Scirica, C.J., dissenting) (explaining why the panel majority's analysis was misguided).

NAB also agrees that the Third Circuit majority unreasonably rejected the FCC's expert judgment as to the significance of the Internet to media diversity. FCC Cross-Petition 24-27. *See, e.g.*, *State Farm*, 463 U.S. at 43 (scope of agency review is "narrow and a court is not to substitute its judgment for that of the agency"); *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 813-14 (1978). Although the Third Circuit conceded that the Commission's survey "suggested that the Internet is a source of local news," Pet. App. 53a, the majority chastised the Commission, holding that the FCC "should have discounted" the survey responses because, in the majority's view, the Internet was not sufficiently shown to be a source of local news, *id.* at 54a-58a.

As Chief Judge Scirica noted, however, assigning the appropriate weight for a media service such as the Internet is

"as much art as science." Pet. App. 164a. Given the ample evidence in the record to support the weights assigned by the Commission, *see generally id.* at 164a-165a, the panel majority had no legitimate basis for questioning the FCC's conclusions. Indeed, as Chief Judge Scirica noted, the FCC likely *understated* the weight properly assigned to the Internet, in light of the explosive growth of, and the public's increasing facility with, that medium. There can be little doubt then that, as Chief Judge Scirica below and the FCC here have contended, the panel majority "substituted its judgment for that of the FCC." *Id.* at 160a.

2. Although NAB may not agree with the Commission's arguments in all their particulars, the errors identified by the FCC reinforce NAB's contention that the Third Circuit's decision cannot be reconciled with traditional principles of administrative review, much less the higher standard that Congress imposed in § 202(h). The issues raised by the Commission are thus consonant with, and reinforce, the principal points made in NAB's petition. Moreover, as noted, the Third Circuit has sought to assert jurisdiction over any order of the FCC on remand. For those reasons, NAB does not oppose the FCC's conditional cross-petition.

That said, it is not correct that granting the conditional cross-petition is necessary for this Court to consider the issues raised in NAB's petition. *Cf.* FCC Cross-Petition 19-20. The challenge to the Commission's revised radio ownership rules presented in NAB's petition is a purely statutory one: whether § 202 precludes the Commission from restricting station combinations to levels below those established by Congress in the 1996 Act. Resolution of that question does not require any resort to "detailed consideration" of the issues and evidence raised in the FCC's cross-petition. FCC Cross-Petition 20. NAB thus disputes the FCC's contention that there are no "practical reasons to refuse to consider" the FCC's petition. *Id.* The statutory

question presented by NAB is straightforward and largely independent of the voluminous factual record developed before the agency, on which the FCC's issues likely depend. Any concerns about the fact-specific and record-dependent nature of the issues presented in the cross-petition should have no effect on the decision to grant review on the local radio issue raised in NAB's petition.[4]

Similarly, the Court could well address NAB's challenge to the Commission's top-4 television duopoly rule without considering the range of issues in the cross-petition. The newspaper cross-ownership issues and the Commission's numerical limits on local radio station ownership are entirely irrelevant to the top-4 restriction. To be sure, there is some evidentiary overlap between the record relevant to NAB's challenge to the top-4 restriction and the other television-related issues raised in the cross-petition. But the core of NAB's challenge is that the top-4 restriction precludes or drastically limits combinations in the markets with the fewest stations. *See* NAB Petition 27 (noting that the top-4 rule prevents station combinations in 77% of the smallest markets). That restriction thus operates largely independently of the television numerical limits at issue in the FCC cross-petition, and NAB's challenge could certainly be resolved without addressing all of the issues the FCC raises.

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[4] Nor is their any basis for the FCC's assertion that the question whether the rules are supported by "reasoned analysis" is "logically prior" to the question of whether the rules are prohibited by statute. FCC Cross-Petition 20. There is no doctrine of "statutory avoidance," and reviewing courts will often review agency action for consistency with the statute without considering whether, assuming such consistency, the agency's application was supported by reasoned analysis. *Cf. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (step one of analysis is considering whether result is foreclosed by statute).

CONCLUSION

NAB does not oppose the Court's granting the FCC's conditional cross-petition. Whether or not the Court believes the cross-petition is worthy of review, however, NAB's petition (04-1033) should be granted.

Respectfully submitted,

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Nos. 04-1020, 04-1033, 04-1036, 04-1045, 04-1168, and 04-1177

In the Supreme Court of the United States

MEDIA GENERAL, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *Respondents*

ON PETITIONS AND CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether this Court should overrule its long-settled holdings in *Red Lion Broadcasting v. FCC* and *FCC v. National Citizens Committee for Broadcasting* that broadcast regulations receive rational basis review under the First Amendment, that newspaper-broadcast cross-ownership regulations do not impermissibly discriminate in violation of the First or Fifth Amendment, and that newspaper-broadcast cross-ownership regulations are content-neutral.

2. Whether the court of appeals' interpretation of §202(h) of the 1996 Telecommunications Act accords with the decisions of the only other court of appeals to have considered the issue.

3. Whether the court of appeals properly remanded for justification or modification certain aspects of the Federal Communications Commission's 2002 Biennial Regulatory Review Order that were not supported by the record or that lacked reasoned analysis.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Public Interest Respondents state as follows:

Prometheus Radio Project, Fairness and Accuracy in Reporting, Center for Digital Democracy, Media Alliance, Office of Communication of the United Church of Christ, Inc., Consumer Federation of America, Consumers Union, American Hispanic Owned Radio Association, Civil Rights Forum on Communications Policy, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, Minority Media and Telecommunications Council, National Asian American Telecommunications Association, National Association of Latino Independent Producers, National Coalition of Hispanic Organizations, National Council of La Raza, National Hispanic Media Coalition, National Indian Telecommunications Institute, National Urban League, Native American Public Telecommunications, Inc., PRLDEF—Institute for Puerto Rican Policy, Unity: Journalists of Color, Inc., Women's Institute for Freedom of the Press, and National Council of the Churches of Christ in the United States have no parent companies or publicly-issued stock.

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Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report & Order, 50 F.C.C.2d 1046 (1975), *vacated in part, KCMC, Inc. v. FCC*, 600 F.2d 546 (5th Cir. 1979) 11, 12

Miscellaneous

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STATEMENT

Public Interest Respondents[1] generally adopt the statement of the United States in this case, and write separately to underscore two additional points.

1. The court of appeals upheld much of the FCC's 2002 Biennial Regulatory Review Order ("*2002 Biennial*"). Pet. App. 1a-190a.[2] The court's comprehensive opinion properly notes that the scope of judicial review of federal agency action is "narrow" and that it is only authorized to remand an agency decision when "it is not supported by substantial evidence, or the agency has made a clear error in judgment." *Id.* at 25a (internal citations omitted). For example, the court upheld the FCC's decisions to relax its cross-ownership ban, *id.* at 40a, to retain the "top four" restriction on ownership of local television stations, *id.* at 72a, to revise its definition of local radio markets, *id.* at 85a, and to count "joint sales agreements" toward a radio station's permissible ownership total, *id.* at 96a.

2. The court of appeals was unanimous in its disposition of many key arguments raised by Petitioners and Cross-

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[1] Public Interest Respondents are Prometheus Radio Project, Fairness and Accuracy in Reporting, Center for Digital Democracy, Media Alliance, Office of Communication of the United Church of Christ, Inc., Consumer Federation of America, Consumers Union, American Hispanic Owned Radio Association, Civil Rights Forum on Communications Policy, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, Minority Media and Telecommunications Council, National Asian American Telecommunications Association, National Association of Latino Independent Producers, National Coalition of Hispanic Organizations, National Council of La Raza, National Hispanic Media Coalition, National Indian Telecommunications Institute, National Urban League, Native American Public Telecommunications, Inc., PRLDEF—Institute for Puerto Rican Policy, Unity: Journalists of Color, Inc., Women's Institute for Freedom of the Press, and the National Council of the Churches of Christ in the United States.

[2] References are to the appendix filed by Petitioner in 04-1020.

Petitioners. The court unanimously rejected all of the constitutional challenges raised by Petitioners. *See* Pet. App. 107a. Chief Judge Scirica agreed with the majority on the proper legal standards for review of agency decisions, *compare id.* at 24a-26a, *with id.* at 116a-118a, but came to a different conclusion as to the application of those standards to certain specific rules.

REASONS TO DENY THE WRIT

Review by this Court would be premature. The court of appeals neither forbade nor compelled the implementation of specific rules; it simply remanded those rules that were without factual record support or rational agency explanation. Because many rules challenged by Petitioners are not expected to be retained on remand, review of those rules would likely be unnecessary. Further, all of the rules at issue in this case may be modified or repealed by the FCC during the next congressionally-mandated review of media ownership rules, which the FCC will conduct in 2006. This Court should not expend its scarce judicial resources to pass on specific rules that may be repealed or modified by the time its decision is issued.

More importantly, despite the voluminous record below, the proceeding did not focus on the core issue raised by many Petitioners—whether spectrum scarcity continues to exist. Accordingly, even assuming this Court should wish to revisit this fact-dependent question, this case would be a poor vehicle through which to do so.

Nor does this case present any broad, unsettled issues of law for this Court to review. The court below did not announce any new principle of constitutional law; it simply applied doctrine that has been clearly established by this Court. Petitioners present no valid reason for this Court to overrule this precedent. Further, the Third Circuit's interpretation of the relevant statute's standard of review provision is in com-

plete harmony with the explanation of the only other court of appeals to have considered it.

Stripped of its constitutional and statutory rhetoric, this case is simply about the application of properly articulated administrative law principles to a complex factual record. Such case-specific issues do not warrant this Court's intervention. Sup. Ct. R. 10.

I. PETITIONERS HAVE NOT DEMONSTRATED ANY COMPELLING REASON TO OVERRULE LONGSTANDING PRECEDENT

The appropriate standard of review for assessing the constitutionality of the FCC's broadcast ownership rules was decided by this Court in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) ("*NCCB*"). The court of appeals properly applied the standards established in *NCCB* to this case. Essentially conceding this point, three Petitioners nonetheless urge this Court to reconsider and overrule *NCCB*.

In *NCCB*, newspaper and broadcast station owners challenged the FCC's then recently adopted newspaper-broadcast cross-ownership rule, which was much more restrictive than the rules at issue in this case. The Court rejected the argument that the cross-ownership rule violated the First Amendment, finding that the argument "ignore[d] the fundamental proposition that there is no 'unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.'" 436 U.S. at 799 (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388 (1969)). The Court observed that the "physical limitations of the broadcast spectrum are well known" and that the number of frequencies used for broadcasting "is far exceeded by the number of persons wishing to broadcast to the public." 436 U.S. at 799.

This Court has repeatedly emphasized that the reconsideration of previous decisions should be approached with the utmost caution. *See, e.g.*, *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Indeed, just last term, this Court explicitly relied on *Red Lion* in upholding an important provision of the Bipartisan Campaign Reform Act of 2002. *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 237 (2003). Because, as shown below, Petitioners present no compelling reason for this Court to reconsider its prior decisions, the Court should deny certiorari.

A. Petitioners Have Presented No Compelling Reason To Revisit *NCCB*'s Holding That Rational Basis Is The Appropriate Standard For Review Of Broadcast Regulations

As far back as 1943, this Court rejected a constitutional challenge brought by the broadcast networks against an FCC ownership rule known as the "chain broadcasting rule." The Court recognized that "[u]nlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation." *Nat'l Broad. Co., Inc. v. United States*, 319 U.S. 190, 226 (1943). Subsequently, in *Red Lion*, the Court explained that "in view of the limited number of available broadcasting frequencies," it did not violate the First Amendment for the FCC to require broadcasters to serve the public interest by providing certain types of programming. 395 U.S. at 394 (internal quotations omitted).

1. Neither Congress Nor The FCC Have Signaled That This Court Should Reconsider Its Approach to Broadcast Regulation

In *FCC v. League of Women Voters of California*, the Court concluded that "[w]e are not prepared . . . to reconsider our longstanding approach [of *Red Lion*] without some signal

from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." 468 U.S. 364, 376 n.11 (1984). This signal has not been given.

a. In this very proceeding, the FCC reaffirmed its support for the scarcity doctrine. Responding to arguments made by two of the present Petitioners, the FCC stated:

> We disagree with Media General and Tribune, who argue that our ownership rules affecting newspapers should be judged under strict scrutiny First Amendment analysis. Media General and Tribune claim that spectrum scarcity is no longer a valid rationale for media ownership limits . . . . [T]he courts have considered and consistently rejected the arguments for a stricter standard of First Amendment scrutiny of broadcast regulation made by commenters here. Accordingly, the rational basis test continues to apply to our ownership rules.

Pet. App. 218a (*2002 Biennial* ¶15). As this makes evident, the FCC is clearly not "signaling" this Court to reconsider the scarcity doctrine.

b. Nor has Congress indicated a desire for the Court to reconsider the scarcity doctrine. To the contrary, Congress has enacted numerous laws imposing public interest requirements premised on the continued existence of scarcity, and in some cases, reinforcing that scarcity.

For example, in the Children's Television Act of 1990, Congress explicitly found that as part of television stations' obligations to serve the public interest, stations should provide programming serving the special needs of children. Congress therefore directed the FCC to consider in renewing television licenses the extent to which the licensee has served the educational and informational needs of children. Chil-

dren's Television Act of 1990, Pub. L. No. 101-437, §§ 101(2), 103(a), 104 Stat. 996, *codified in part at* 47 U.S.C. § 303(a). *See also* H.R. Rep. No. 101-385 at 8 (citing *Red Lion* and rejecting suggestions of constitutional difficulties with Act).

In 1996, Congress added a new section to the Communications Act to establish a framework for the transition from analog to digital television. Telecommunications Act of 1996, Pub. L. No. 104-104, § 201(a), 110 Stat. 56 (1996), *codified at* 47 U.S.C. § 336 ("1996 Act"). Although this transition offered the opportunity for awarding additional broadcast licenses, Congress opted instead to limit eligibility for digital television licenses to the existing licensees. 47 U.S.C. § 336(a)(1). At the same time, Congress reaffirmed that television licensees were expected to continue to meet their obligation to serve the public interest. *Id.* at § 336(d). Thus, if anything, the 1996 Act actually increased scarcity by declining to make this spectrum available to new licensees.[3]

In 1997, Congress directed that the FCC utilize auctions to award all new commercial broadcast licenses, shifting away from a "comparative hearing" process whereby the FCC evaluated each applicant before awarding a license. Balanced Budget Act, Pub. L. No. 105-33, § 3301, 111 Stat. 251 (1997). This action was intended to address the inefficiencies of the hearing process that stemmed from the growing number of applications for new broadcast licenses. H.R. Rep. No. 105-149 at 558; *see also* Karl M. Manheim & Lawrence B. Solum, *An Economic Analysis of Domain Name Policy*, 25 Hastings Comm. & Ent. L.J. 359, 439 (2003). In-

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[3] Tribune claims that Congress' requirement that the FCC redistribute spectrum after the digital television transition is complete demonstrates that it no longer believes the spectrum is scarce. 04-1036 Pet. 17. In fact, this leads to the opposite conclusion—if there were not more would-be users than available frequencies, Congress would have no reason to re-apportion the spectrum.

deed, the Balanced Budget Act relied upon spectrum scarcity in requiring that minimum amounts be raised by each auction. H.R. Rep. No. 105-149 at 569-72 (setting minimum amounts "[i]n recognition of the scarcity (and hence, the value) of spectrum"). Both the use of auctions and the high prices they generate[4] demonstrate that there continue to be far more would-be broadcasters than can be accommodated by the broadcast spectrum.

In 2000, Congress actually rolled back an FCC attempt to award additional broadcast licenses through the creation of a new, noncommercial low power FM radio service. A provision in the Department of Commerce and Related Agencies Appropriations Act of 2001 limited the number of low-power radio applications that the FCC could grant, due to concerns that allowing more radio stations on the air would interfere with existing broadcast stations. H.R. 5548 § 632, *enacted by* H.R. 4942, Pub. L. No. 106-553, 114 Stat. 2762 (2000).

And finally, in early 2004, Congress passed legislation rolling back the FCC's relaxation of the national television audience limits. Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3 (2004). As part of the *2002 Biennial*, the FCC increased the percentage of the national television audience that one company could "reach" from 35% to 45%. Congress overruled the FCC's decision

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[4] For example, the FCC's first ever open auction of the FM broadcast spectrum saw over 450 bidders participate, and resulted in 110 winning bidders paying nearly $150 million for a portion of the spectrum. News Release, FCC Announces Close to Unprecedented FM Auction (Nov. 24, 2004). The FCC noted that this auction "signifie[d] the continuing strong demand for radio broadcast spectrum." *Id.* In another example, eleven bidders vied for a single television station license in Blanco, TX; the winning bid approached $19 million. Public Notice, Blanco, Texas Broadcast Auction No. 80 Closes (July 18, 2000). One reason for the high prices generated by spectrum auctions is that "very few 'new' broadcast licenses are issued these days," a fact that is "the consequence of spectrum scarcity." Manheim & Solum, *supra*, at 441.

and rolled the cap back to 39%. If Congress did not believe that the spectrum was "scarce," it would have no reason to cap permissible ownership. As the D.C. Circuit explained, "[i]n the face of [the limited capacity of the spectrum], the national ownership cap increases the number of different voices heard in the nation . . . . But for the scarcity rationale, that increase would be of no moment." *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1046, *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002).

2. Spectrum Scarcity Continues To Exist As A Matter Of Fact

Various Petitioners nonetheless argue that this Court should reconsider *NCCB* and *Red Lion* because the factual predicate of the scarcity doctrine has been eroded by the development of cable television, direct broadcast satellites, and the internet. 04-1020 Pet. 10-11, 04-1036 Pet. 16, 04-1045 Pet. 26. But, as the court of appeals correctly recognized, "[t]he abundance of non-broadcast media does not render the broadcast spectrum any less scarce." Pet. App. 47a. Nor is there any conflict among the Circuits on this point. The D.C. Circuit recently rejected the same argument, noting that the "protest that *NCCB* [and the scarcity doctrine] is no longer controlling because it is undermined by the advent of cable television, DBS, and the internet, is to no avail." *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 168-69 (D.C. Cir. 2002) (internal quotations and citations omitted); *see also American Family Ass'n, Inc. v. FCC*, 365 F.3d 1156, 1169 (D.C. Cir. 2004) (noting that the number of frequencies that can be productively used "is far exceeded by the number of persons wishing to broadcast").

Further evidence that there continue to be more would-be broadcasters than frequencies available for licensing is demonstrated by the large number of unlicensed broadcast stations that have been shut down by the FCC in recent

years.[5] Likewise, Media General's contention (04-1020 Pet. 12-13) that the scarcity doctrine has been undermined because this Court has not extended the doctrine to cable or internet regulations misses the point. As the *Red Lion*'s scarcity doctrine is based on the unique physical characteristics of the broadcast spectrum, the fact that the doctrine has not been extended beyond the broadcast arena in no way undercuts its viability in the broadcast arena. Spectrum scarcity exists today in the same form that it did when this Court first recognized the doctrine more than a half-century ago.[6] Further review of this factual question, which was not addressed by the FCC or the court of appeals and barely raised in the huge administrative record, is unwarranted.

3. There Is No Conflict Among The Circuits Regarding The Scarcity Doctrine

Contrary to many Petitioners' contentions, there is no conflicting authority among the courts of appeals regarding the scarcity doctrine or the appropriate level of scrutiny for broadcast regulations. Every Circuit has recognized that broadcasting regulation is subject to more deferential review

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[5] *See, e.g., Ruggiero v. FCC*, 317 F.3d 239, 242 (D.C. Cir. 2003); *Grid Radio v. FCC*, 278 F.3d 1314, 1316 (D.C. Cir. 2002); *Prayze FM v. FCC*, 214 F.3d 245, 250 (2d Cir. 2000); *United States v. Any and All Radio Station Transmission Equip.*, 218 F.3d 543, 549-50 (6th Cir. 2000); *United States v. Any and All Radio Station Transmission Equip.*, 207 F.3d 458, 459 (8th Cir. 2000); *United States v. Dunifer*, 219 F.3d 1004, 1005 (9th Cir. 2000); *Free Speech ex rel. Ruggiero v. Reno*, 200 F.3d 63, 64 (2d Cir. 1999) (per curiam).

[6] Media General claims (04-1020 Pet. 22) that because modern technology has increased the amount of spectrum available for use, scarcity no longer exists. This is not the case. *Red Lion*'s observation that "[a]dvances in technology . . . have led to more efficient utilization of the frequency spectrum, but uses for the spectrum have also grown apace," 395 U.S. at 396-97, remains true today with the tremendous growth in cellular telephone service and other wireless services.

under the First Amendment due to the fact that more people wish to broadcast than the spectrum can accommodate.[7]

Tribune contends (04-1036 Pet. 13) that the Third Circuit's suggestion that it would endorse the scarcity doctrine "[e]ven were [it] not constrained by Supreme Court precedent," Pet. App. 47a, somehow creates a conflict with the D.C. Circuit. This is not so. While comments critical of the scarcity doctrine have sometimes appeared in dissenting or concurring opinions of the D.C. Circuit, *see, e.g.*, *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) (dissent from denial of rehearing en banc); *Action for Children's Television v. FCC*, 58 F.3d 654, 675 (D.C. Cir. 1995) ("*ACT*") (Edwards, C.J., dissenting); *Syracuse Peace Council v. FCC*, 867 F.2d 654, 682-83 (D.C. Cir. 1989) (Starr, J., concurring), such comments are dicta, and conflicts involving dicta do not merit certiorari. *See, e.g.*, *Bunting v. Mellen*, 541 U.S. 1019, 124 S.Ct. 1750, 1754 (2004). Recognizing that *Red Lion* continues to "rule the

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[7] For example, the D.C. Circuit recently reviewed the FCC's system for awarding non-commercial educational broadcast licenses and held that the scheme was subject to deferential review under the First Amendment. It concluded that "[r]egulation of some form is an irreducible feature of any broadcast spectrum worth having, since 'a finite number of frequencies can be used productively; this number is far exceeded by the number of persons wishing to broadcast to the public.'" *American Family Ass'n*, 365 F.3d at 1169 (quoting *NCCB*, 436 U.S. at 798). *See also Mark v. FCC*, 468 F.2d 266, 269 (1st Cir. 1972); *Free Speech ex rel. Ruggiero v. Reno*, 200 F.3d 63, 64 (2d Cir. 1999) (per curiam); *Adventure Communications, Inc. v. Kentucky Registry of Election Fin.*, 191 F.3d 429, 439-40 (4th Cir 1999); *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1039, 1043 (5th Cir. 1982); *United States v. Szoka*, 260 F.3d 516, 526 (6th Cir. 2001); *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d 1540, 1548 (7th Cir. 1989); *Black Hills Video Corp. v. FCC*, 399 F.2d 65, 69 (8th Cir. 1968); *Scott v. Rosenberg*, 702 F.2d 1263, 1272 (9th Cir.1983); *Cmty. Communications Co., Inc. v. City of Boulder, Colo.*, 660 F.2d 1370, 1376 n.5 (10th Cir. 1981); *In re Beach Television Partners*, 38 F.3d 535, 536 (11th Cir. 1994).

broadcast jungle," *Tribune Co. v. FCC*, 133 F.3d 61, 69 (D.C. Cir. 1988), the D.C. Circuit has consistently and properly applied the scarcity doctrine. *See, e.g.*, *American Family Ass'n*, 365 F.3d at 1168; *Radio-Television News Dir. Ass'n v. FCC*, 184 F.3d 872, 877 n.3 (D.C. Cir. 1999) ("*RTNDA*"); *Telecomm. Research & Action Ctr. v. FCC*, 801 F.2d 501, 509 (D.C. Cir. 1986) ("*TRAC*"). Thus there is simply no conflict for this Court to review.

B. Petitioners Have Presented No Compelling Reason To Revisit *NCCB*'s Equal Protection Holding

Certain Petitioners also challenge the court of appeals' decision that rules barring newspapers from owning broadcast stations do not impermissibly discriminate in violation of the First or Fifth Amendment. As with the scarcity doctrine, this Court has already addressed this issue. In *NCCB*, the Court upheld a ban on newspaper-broadcast cross-ownership against an equal protection challenge, finding the regulations to be a "reasonable means" of promoting the FCC's objectives. 436 U.S. at 801-02. Indeed, even Media General acknowledges (04-1020 Pet. 24) that the *NCCB* Court rejected the argument that the cross-ownership regulations unfairly single out newspaper owners.

1. Nonetheless, Media General and Tribune argue that this Court should reconsider *NCCB* because "in *NCCB's* day, the only other 'major media of mass communications' besides newspapers were broadcast television and radio," while today other forms of mass media such as cable and internet are available. 04-1020 Pet. 24; *see also* 04-1036 Pet. 20. This misreads *NCCB*. The cross-ownership rule at issue in *NCCB* was not intended to diversify all major media of mass communication; rather, the FCC sought to regulate media cross-ownership to promote diversity of viewpoints within local communities. 436 U.S. at 786 (citing *Rules Relating to Multiple Ownership of Standard, FM, and Television Broad-*

cast Stations, Second Report & Order, 50 F.C.C.2d 1046, 1075 (1975) ("*1975 Order*")). The FCC excluded certain types of mass media, such as magazines and other periodicals that "dealt exclusively with regional or national issues and ignored local issues." *1975 Order*, 50 F.C.C.2d at 1080 ¶112; *see also NCCB*, 436 U.S. at 787 n.10. Thus, in 1975, the FCC recognized that other major mass media existed, but chose to restrict common ownership of only those media that covered local issues—specifically newspapers, broadcast television, and broadcast radio.

Similarly, in the *2002 Biennial*, the FCC sought to "preserv[e] viewpoint diversity among local, not national, news sources." Pet. App. 484a-485a (*2002 Biennial* ¶399). Thus, the FCC excluded "the large number of *national* news sources such as all-news cable channels and the news sources on the Internet." *Id.* (emphasis added). Finding that "broadcast television, daily newspapers, and broadcast radio" continue to be "the three media platforms that Americans turn to most often for local news and information," *id.* at 520a (*2002 Biennial* ¶452), the FCC appropriately limited the cross-media limits to the media that are the most significant sources of local news.

Petitioners Newspaper Association of America, Belo Corp., Gannett Co., Inc., and Morris Communications Company, LLC ("NAA") (04-1045 Pet. 27), along with Media General (04-1020 Pet. 25), also claim that the specific cross-ownership regulations adopted in the *2002 Biennial* violate *NCCB*'s equal protection holding because they treat newspaper owners somewhat differently than radio and television station owners. Again, these Petitioners misread *NCCB*. *NCCB* merely required the cross-ownership regulations reviewed below to treat newspaper and broadcast owners "in *essentially* the same fashion." 436 U.S. at 801 (emphasis added). As with the rules at issue in *NCCB*, the cross-ownership regulations treat newspaper and broadcast owners

essentially the same way in that all are restricted in their ability to own another type of local media. *See* Pet. App. 452a. Moreover, contrary to Media General's absolute statement that "a cable company may buy a broadcast station even where a newspaper may not," 04-1020 Pet. 24, a newspaper owner may receive a waiver of the rule to co-own a broadcast station in certain circumstances. Pet. App. 437a (*2002 Biennial* ¶481).

2. The court of appeals' decision not to apply heightened scrutiny to the cross-ownership regulations does not conflict with any decision of this Court. The *NCCB* Court did not apply heightened scrutiny in its disposal of the equal protection challenges, but rather found that content-neutral regulations that prevent any person from owning both a newspaper and a broadcast station are a "*reasonable means* of promoting the public interest in diversified mass communications." 436 U.S. at 802 (emphasis added).

Moreover, *NCCB*'s use of rational basis review is fully consistent with this Court's recent jurisprudence. Tribune and Cross-Petitioner Sinclair Broadcast Group, Inc. ("Sinclair") rely (04-1036 Pet. 21-22, 04-1177 Pet. 15) on *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*") to argue that *any* regulation that distinguishes between classes of media outlets demands heightened scrutiny. However, this argument is directly precluded by *Turner I*'s admonition that "[i]t would be error to conclude . . . that the First Amendment mandates strict scrutiny for any speech regulation that applies to one medium (or a subset thereof) but not others." 512 U.S. at 660. *Turner I*'s touchstone for determining the level of scrutiny is the type of medium; "heightened scrutiny is unwarranted when the differential treatment is justified by some special characteristic of the particular medium being regulated." *Id.* at 660-61 (internal citations omitted). As the cross-ownership restrictions apply

to broadcast media, the "special characteristic" of spectrum scarcity makes heightened scrutiny unwarranted.

The other cases relied upon by Tribune (04-1036 Pet. 21-23; *see also* 04-1177 Cross-Pet. 15) are inapposite to the question of the proper standard of review of content-neutral broadcast regulations. *League of Women Voters* applied heightened scrutiny because the statute in question was a *content-based* speech restriction. 468 U.S. at 383.[8] *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), considered the constitutionality of a tax imposed only on newspapers, and is directly analogous to *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), which the *NCCB* Court held not to be controlling on the question of cross-ownership regulations, 436 U.S. at 801. Finally, the two court of appeals decisions cited by Tribune (04-1036 Pet. 22-23) concerned regulation of telephone companies, and both cases expressly recognized that broadcast ownership regulations receive a different and lower level of constitutional scrutiny.[9]

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[8] *See also Fox Television Stations*, 280 F.3d at 1046 (rejecting heightened scrutiny because the rule at issue, "unlike the [rule] at issue in *League of Women Voters*, is not a content-based regulation; it is a regulation of industry structure, like the newspaper/broadcast cross-ownership rule the Court concluded was content-neutral in *NCCB*").

[9] Further, both cases were vacated by this Court. *US West, Inc. v. United States*, 48 F.3d 1092, 1098 (9th Cir. 1994), *vacated*, 516 U.S. 1155 (1996); *Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181, 191 (4th Cir. 1994), *vacated*, 516 U.S. 415 (1996) (per curiam).

C. The Court Below Did Not Address Whether Cross-Ownership Regulations Are Content-Based; Nor Have Petitioners Presented Compelling Reason To Revisit *NCCB*'s Holding That Such Regulations Are Content-Neutral

Media General's and Tribune's contention (04-1020 Pet. 26; 04-1036 Pet. 23) that the cross-ownership regulations should have been subjected to heightened scrutiny because they are content-based restrictions on speech likewise provides no basis for reconsidering *NCCB*. As a threshold matter, review of this argument is inappropriate because it was not addressed in the decision below. This Court "do[es] not decide in the first instance issues not decided below." *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999).

Certiorari is also unnecessary because this Court has already addressed the question, specifically holding that newspaper-broadcast cross-ownership regulations "are not content related." *NCCB*, 436 U.S. at 801. Lower courts have properly followed that decision, recognizing that cross-ownership rules are simply structural regulations that receive minimal constitutional scrutiny. *See, e.g.*, *American Family Ass'n*, 365 F.3d at 1169; *Ruggiero*, 317 F.3d at 244.

In any event, the court of appeals' decision that the structural cross-ownership regulations are not content-based is correct. As this Court has explained, "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The cross-ownership regulations were not at all motivated by the message of the speaker, but rather were developed to ensure a diversity of media voices was available to the public. Pet. App. 481a-482a (*2002 Biennial* ¶¶393-94). "[B]y placing a value upon diversity the FCC did not necessarily . . . value one speaker, or one type of speech over another; it merely

expressed its intention that there continue to be multiple speakers." *American Family Ass'n*, 365 F.3d at 1169 (internal quotations omitted).

The D.C. Circuit has held that analogous regulations of the structure of cable ownership that were motivated by diversity concerns were not content-based. In *Time Warner Entertainment Co. v. United States*, the court noted that "[a]s the Supreme Court made quite clear in *Turner I*, . . . making way for some speakers" in a context like broadcasting "where that necessarily means limiting the speech of others, is not inherently content-based." 211 F.3d 1313, 1317 (D.C. Cir. 2000). This same, traditional rationale clearly applies to the present regulations—rules restricting broadcast ownership to promote a diversity of media outlets are not subject to heightened First Amendment scrutiny.

D. Should The Court Wish To Reconsider Its Constitutional Precedent, Other Cases Offer A Better Opportunity For Fully Assessing The Issues

The *2002 Biennial* focused on specific ownership rules and not the factual underpinnings of the scarcity doctrine. Any reference to the continued existence of spectrum scarcity was an inconsequential piece of a massive record, and the factual basis for doctrine was not addressed on the merits by the FCC or the court of appeals. Re-examination of the scarcity doctrine would be a fact-intensive process. The present case plainly does not afford this Court a sufficient record or factual basis for such a task.

Moreover, as a practical matter, this case does not present an actual cross-ownership rule for constitutional review. Because the court below agreed with the FCC that the original newspaper-broadcast cross-ownership rule was no longer necessary, *see* Pet. App. 40a, there is no need to re-evaluate the constitutionality of that rule. On the other hand, since the court found that the replacement rule adopted by the FCC

was arbitrary and capricious and subject to further proceedings on remand, it would make no sense to evaluate the constitutionality of that rule at this time.

Further, the FCC has before it at least three licensing cases that squarely present the issue of whether the cross-ownership prohibition is constitutional. Specifically, Media General has filed license renewal applications asking the FCC to waive the newspaper-broadcast cross-ownership rule to allow it to continue to own both a daily newspaper and a television station in the Myrtle Beach-Florence, South Carolina, Panama City, Florida, and Columbus, Georgia DMAs.[10] In making its waiver requests, Media General argues that spectrum scarcity no longer exists and thus the cross-ownership rules are unconstitutional. *See, e.g.* Application for Renewal of Broadcast Station License for WBTW, Media General Opposition to Petition to Deny 39-44 (Dec. 14, 2004). Because these cases present the issue in specific, concrete factual settings, yet do not raise the wide variety of issues presented in the *2002 Biennial*, any one would present a better vehicle for revisiting the constitutional issues raised by Petitioners in this case, should this Court be inclined to do so.

II. THERE IS NO CONFLICT OVER THE INTERPRETATION OF §202(h) OF THE 1996 TELECOMMUNICATIONS ACT

Petitioner National Association of Broadcasters ("NAB"), along with Tribune, NAA, and Respondent Clear Channel Communications, Inc. ("Clear Channel")[11] assert there is a

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[10] Application for Renewal of Broadcast Station License for WBTW, FCC File No. BRCT-20040802BIK (Aug. 6, 2004), Application for Renewal of Broadcast Station License for WMBB, FCC File No. BRCT-20041001AQF (Oct. 7, 2004), Application for Renewal of Broadcast Station License for WRBL, FCC File No. BRCT-20041210BZP (Dec. 8, 2004).

[11] Clear Channel is a Respondent in 04-1033.

circuit split with respect to the FCC's construction of §202(h) of the 1996 Act. This is not so. All three members of the panel agreed that the court of appeals' construction is consistent with that of the D.C. Circuit. Their ruling that the periodic review mandated by §202(h) should employ the normal arbitrary and capricious test generally required by the Administrative Procedure Act is clearly correct and should not be disturbed. Nor is there reason for this Court to examine the court of appeals' unanimous conclusion that §202(h) allows the FCC to adopt stronger rules at the conclusion of the review process.

Although each of the petitioners emphasize the deregulatory thrust of the 1996 Act, there is no suggestion that the ruling below conflicts with any other circuit on this point. *See* Pet. App. 34a (majority noting that 1996 Act is deregulatory); Pet. App 122a (concurring judge noting the "deregulatory flavor" of the 1996 Act). Nor do any of the Petitioners point to express language in any statute that prohibits the FCC from increasing its regulatory oversight when the record justifies such action. Under this Court's jurisprudence, the FCC is entitled to deference in construction of statutory ambiguities such as this, *see, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001), and the petitions surely do not raise an issue here that would support issuance of a writ of certiorari.

1. Tribune, NAA, Sinclair, and Clear Channel argue that the Third Circuit's holding that §202(h) does not impose a more exacting standard of review is in conflict with that of the D.C. Circuit. *See* 04-1036 Pet. 24-26; 04-1045 Pet. 19-23; 04-1177 Cross-Pet. 11-12; Clear Channel Br. 24-27. These arguments mischaracterize the sequence in which the FCC and the D.C. Circuit acted and downplay the D.C. Circuit's definitive decision in *Cellco Partnership v. FCC*, 357 F.3d 88 (D.C. Cir. 2004). As the Third Circuit joined *Cellco*

in holding that the phrase "necessary in the public interest"[12] did not create a deregulatory presumption, and "endorsing the [FCC]'s view that 'necessary' must mean the same thing in the periodic review context as in the rulemaking context," Pet. App. 31a, there is no conflict.[13]

Clear Channel's quotations of fragments from *Cellco* are misleadingly incomplete, as can be seen by reference to the complete passages from which Clear Channel quotes. For example, Clear Channel claims that *Cellco*, "expressly extended to Section 11 the 'presumption in favor of repealing or modifying covered rules' that the D.C. Circuit had found inherent in Section 202(h)." Clear Channel Br. at 26 (quoting *Cellco*, 357 F.3d at 97). What *Cellco* actually said was that "the [FCC] agreed that *where §11's conditions are met*, §11 creates a presumption in favor of repealing or modifying" the

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[12] The provision directly at issue in *Cellco* was §11 of the 1996 Act, a biennial review provision that, just like §202(h), requires the FCC to repeal or modify regulations no longer "necessary in the public interest."

[13] Petitioners rely on the D.C. Circuit's pre-*Cellco* decisions in *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002) ("*Fox I*"), and *Sinclair v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) ("*Sinclair*"). However, the D.C. Circuit later modified the *Fox I* decision to "leave unresolved precisely what §202(h) means." *Fox Television Stations, Inc. v. FCC*, 293 F.3d 537, 540 (D.C. Cir. 2002) ("*Fox II*"). Moreover, *Cellco* explicitly discussed and harmonized its ruling with those in *Fox I*, *Fox II* and *Sinclair*. 357 F.3d at 97-98. The *Cellco* panel pointed out that "shortly after *Sinclair* was decided, the court in [*Fox II*] retracted *Fox I*'s definition of 'necessary'" and that "the court in *Sinclair* did not adopt a general presumption in favor of modification or elimination of regulations." 357 F.3d at 98. Thus, for example, when NAB refers (04-1033 Pet. 22, *see also* 04-1036 Pet. 24, 04-1045 Pet. 19) to *Fox I* and *Sinclair* as imposing "a presumption in favor of repealing or modifying the ownership rules," it ignores the subsequent *Cellco*, ruling, which specifically stated that "neither *Fox I* nor *Sinclair* adopted a controlling definition of 'necessary,' much less the position that §11 embodies a presumption in favor of deregulation." 357 F.3d at 98. Importantly, the *2002 Biennial*, which purports to rely on *Fox I* and *Sinclair*, Pet. App. 215a (*2002 Biennial* ¶11), was issued prior to the *Cellco* decision.

rules. 357 F.3d at 97 (emphasis added). Indeed, there is no dispute within or among the circuits that when a regulation is found no longer to be in the public interest that there is a presumption in favor of repeal or modification. *See id.* at 99. Similarly, although Clear Channel claims that *Cellco* imposes obligations that go "beyond [the FCC's] normal monitoring responsibilities," Clear Channel Br. at 26 (quoting *Cellco*, 357 F.3d at 99), the decision's preceding sentence makes clear that the *Cellco* court was referring to remedies, not the threshold test. 357 F.3d at 99 ("The [FCC] reasonably concluded that the deregulatory presumption arises only after it has determined under §11(a) that a regulation is no longer necessary in the public interest.").

2. NAB, supported by Clear Channel, presents a second statutory argument, claiming that the deregulatory goals of the 1996 Act permit the FCC only to deregulate and precludes it from ever tightening its radio ownership regulations at the conclusion of a biennial review. 04-1033 Pet. 19-26; Clear Channel Br. 20-24. There is no suggestion of a circuit conflict on this point, and no specific statutory provision governs this question. This, then, is also an issue as to which the FCC is entitled to substantial deference. *See, e.g.,. Mead,* 533 U.S. at 229.

NAB argues (04-1033 Pet. 22) that "Sections 202(b) and 202(h) together express a clear directive that local ownership restrictions not be tightened," but none of the language it cites from the statute or the D.C. Circuit's *Fox* and *Sinclair* decisions addresses the particular issue presented here. To say that "Congress set in motion a process to deregulate the structure of the broadcast and cable industries," 04-1033 Pet. 22 (quoting *Fox I*, 280 F.3d at 1033), is not inconsistent with an agency determination that the deregulatory process can be accomplished with one step backward and three steps forward.

Both NAB and Clear Channel likewise maintain that the phrase "repeal or modify" must be read so that "modify" means only "that the [FCC] can relax existing restrictions; it does not authorize the [FCC] to tighten them." 04-1033 Pet. 23; *see also* Clear Channel Br. 20, and that the court of appeals ruling "conflicts with the text and structure of Section 202 as a whole." Clear Channel Br. 21. There is no basis to disturb the court of appeals' holding on this point. As the panel majority reasonably explained, the deregulatory goal of §202(h) is fulfilled by "requir[ing] the [FCC] periodically to justify its existing regulations, an obligation it would not otherwise have." Pet. App. 34a. *See also id.* at 124a ("Despite §202(h)'s admittedly deregulatory tenor, the statute does not foreclose the possibility of increased regulation under the biennial review if the [FCC] finds such action in the public interest.") (Scirica, C.J., concurring in part and dissenting in part). There is nothing important or novel about this garden variety question of statutory construction, or the resolution of it below, much less anything which would rise to the level of significance to merit this Court's attention.

III. ROUTINE APPLICATION OF WELL-SETTLED ADMINISTRATIVE LAW STANDARDS DOES NOT MERIT THIS COURT'S INTERVENTION

1. Both NAA and the Government's Conditional Cross-Petition contend (04-1045 Pet. 23-25; 04-1168 Cross-Pet. 21-28) that the court of appeals did not afford sufficient deference to the FCC's decisionmaking.[14] Yet neither claims that

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[14] The deference claim is not raised by other industry Petitioners. Like Public Interest Respondents, many industry Petitioners argued to the court below that certain FCC decisions were arbitrary and capricious. *See* Pet. App. 52a (industry petitioners argued exclusion of cable but inclusion of internet in diversity index arbitrary and capricious); 58a (industry petitioners argued "equal market shares" assumption arbitrary and capricious); 103a (industry petitioners argued specific local radio limits arbitrary and capricious).

the court failed to articulate the correct deference standards. *See* 04-1045 Pet. 24; 04-1168 Cross-Pet. 23, 27. Indeed, the court below correctly noted that its scope of review was narrow, Pet. App. 25a, that it was not to substitute its judgment for that of the agency, *id.*, and that "[d]eference to the [FCC]'s judgment is highest when assessing the rationality of the agency's line-drawing endeavors," *id.* at 62a. The court remanded only when the agency's decision was "not supported by substantial evidence." *Id.* at 25a. Importantly, there was no disagreement between the majority and Chief Judge Scirica about the proper legal standards, *compare id.* at 24a-26a, *with id.* at 116a-118a; the only disagreement was over the application of those standards to specific rules at issue. At bottom, NAA and the Government simply quarrel over this application of law to fact. That issue does not merit review. Sup. Ct. R. 10.

2. Notwithstanding the fact that this issue does not warrant intervention by this Court, the court of appeals' decision to remand certain rules was correct. The Government claims (04-1168 Cross-Pet. 21) that the court of appeals should have deferred to the FCC's decision to assume equal market shares for outlets within the same media. The flaw in this argument, as the court observed, is that this equal market share assumption conflicted with other parts of the *2002 Biennial*, where the FCC expressly found that there was "no reason to believe that all media are of equal importance." Pet. App. 59a (quoting *2002 Biennial* ¶409). The court correctly pointed out that "the assignment of equal market shares generates absurd results," such as the Dutchess Community College television station receiving a market share *equal to* New York City's ABC affiliate and *higher than* the *New York Times*. Pet. App. 59a. In sum, the court found that "assuming equal market shares [is] unrealistic and inconsistent with the [FCC]'s overall approach . . . and proffered rationale," and thus it properly remanded that decision. *Id.* at 61a.

The Government also questions (04-1168 Cross-Pet. 24) the deference given to the FCC's decision to give substantial weight to the internet in the FCC's Diversity Index. Once again, however, the court appropriately remanded in light of the FCC's failure to explain obvious inconsistencies. The court correctly noted that the FCC's rationale for excluding cable television from the Diversity Index also necessarily applied to the internet. *See* Pet. App. 52a-58a. For example, while the FCC discounted cable where a survey suggesting that cable was a source of local news conflicted with other record evidence, the FCC failed to discount the internet under analogous circumstances. *Id.* at 55a.[15] Because the similarities between cable television and the internet required consistent treatment, the court properly found that the "decision to count the Internet as a source of viewpoint diversity, while discounting cable, was irrational." *Id.* at 52a.

Finally, the Government challenges (04-1168 Cross-Pet. 27-28) the court of appeals' review of specific limits chosen regarding cross-media and local radio station ownership. But in fact the court *upheld* many of the FCC's line-drawing decisions, *see id.* at 75a (upholding "top-four restriction" on local TV ownership), 85a (upholding local radio market definition), only remanding those that were marred by inconsistencies. For example, the specific limits created by the FCC, purportedly developed to prevent "problematic levels of concentration," *id.* at 509a (*2002 Biennial* ¶435), would have allowed certain media combinations resulting in considerably higher concentration levels than others that were prohibited. The court correctly held that "[t]he [FCC]'s failure to provide any explanation for this glaring inconsistency is without a

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[15] Further, the court noted that the FCC's attempt to justify the differential treatment by arguing that local cable news is not available to everyone while the internet is was inconsistent with the FCC's recognition (elsewhere in the *2002 Biennial*) that nearly one-third of Americans have no internet access. Pet. App. at 57a-58a.

doubt arbitrary and capricious." *Id.* at 63a. Thus, while the court properly engaged in highly deferential review of specific limits chosen by the FCC, it did not abdicate its responsibility to remand when the lines drawn were not supported by the record and therefore "patently unreasonable." *Sinclair*, 284 F.3d at 162.[16]

It is a truism that this Court is "'[a] court of law . . . rather than a court for correction of errors in fact finding.'" *Missouri v. Jenkins*, 515 U.S. 70, 162 (1995) (Souter, J., dissenting) (quoting *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 275 (1949)). As the decision below rests upon a correct understanding of this Court's principles of administrative deference, Petitioners' contention is simply that the court of appeals misapplied the law to the facts of this case. As explained above, that case-specific issue does not merit this Court's attention.

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[16] The Government also challenges (04-1168 Pet. 27-28) the remand of the FCC's specific local radio ownership limits. Once again, the court of appeals remanded these limits because of the irrational and inconsistent manner in which they were developed. For example, the court pointed out that the FCC failed to explain why it ignored the DOJ/FTC Merger Guidelines in developing the local radio limits, but expressly relied on the Guidelines in developing analogous local television ownership limits. Pet. App 103a. Further, while the rationale for the local radio ownership limits depended heavily on the theory that a certain number of equal-sized competitors would make a market competitive, the court correctly noted that "record evidence supports neither actual nor potential existence of equal-sized competitors" in the local radio market. *Id.*

CONCLUSION

For the foregoing reasons, this Court should deny the petitions for a writ of certiorari.

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In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, CROSS-PETITIONERS

v.

PROMETHEUS RADIO PROJECT, ET AL.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE CROSS-PETITIONERS

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OPINIONS BELOW

As explained in the conditional cross-petition and the government's brief in opposition in Nos. 04-1020, 04-1033, 04-1036, 04-1045, and 04-1177, the Court should deny all of the petitions for a writ of certiorari in this case and should permit administrative proceedings on remand to go forward before the Federal Communications Commission. Gov't Opp. 12-15; Cross-Pet. 13-19. As the government's conditional cross-petition also explains, however, if the Court were to grant one or more of the petitions in this case, it should also grant the government's cross-petition and review the court of appeals' incorrect determination that the FCC failed to provide a reasoned analysis to support its revised broadcast ownership rules.

A. The "Public Interest" Respondents Have Shown Neither That The Court Should Deny The Government's Conditional Petition, Nor That The Court Of Appeals' Judgment Was Correct

1. The self-described "Public Interest" (PI) respondents argue (PI Opp. 22, 24) that the Court should deny the government's conditional cross-petition because the court of appeals correctly articulated the relevant standard of judicial review and the court's application of that standard—incorrect or not—does not warrant review by this Court. The government does not disagree, provided that *all* the petitions are denied. Cross-Pet. 17 n.8; Gov't Opp. 14-15. As the government explains in the cross-petition, however, the Court should not consider the constitutional and statutory issues raised by other petitioners, which assume the existence of certain FCC rules, unless it first resolves whether the revised broadcast ownership rules actually adopted by the FCC survive review under the Administrative Procedure Act. Cross-Pet. 19-20. Indeed, granting review on the constitutional questions in the procedural posture of this case is unnecessary because those questions have already been settled by decisions of this Court and their consideration would in any event be inconsistent with settled rules requiring the avoidance of constitutional decisions when possible and favoring the resolution of constitutional questions in specific factual settings. Cross-Pet. 18 & n.9.[1]

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[1] The government also agrees with the PI respondents (PI Opp. 4-9) that continuing spectrum scarcity and the consequent need for government allocation of spectrum—a feature unique to broadcasting—continues to provide a sound rationale for the "rational basis" standard of First Amendment review under *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978), and prior cases. As would be expected, there has been academic discussion of that issue, extending

2. The conditional cross-petition identifies three specific errors committed by the court of appeals in reversing the revised ownership rules. Cross-Pet. 21-28. The PI respondents fail to rebut that showing of error.

a. The court of appeals erred when it reversed the Commission's decision to assign an equal weight for purposes of the Diversity Index to all broadcast outlets in the same medium without regard to their market share. The court failed to review deferentially the Commission's predictive judgments and public policy reasons for treating similar media the same, but instead substituted its own judgment that stations should be weighted according to their market share at a particular time. Cross-Pet. 21-24.

The PI respondents contend that the Commission acted arbitrarily when it assigned equal weight to media of the same type (*e.g.*, all television stations received the same weighting), because the Commission had elsewhere in its Order assigned different weights to media of *different* types (*e.g.*, television stations were weighted differently from radio stations). PI Opp. 22. There is no inconsistency. The Commission explained at length (see 04-1020 Pet. App.

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even to a recent paper by an FCC staff member who disagrees with the scarcity rationale. See John W. Berresford, FCC Media Staff Research Paper 2005-2, *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed, available at* <http://www.fcc.gov.mb.mbpapers.html>. As its disclaimer makes clear, however, that paper expresses opinions that are solely "those of the author * * * and do not necessarily represent the views of the Media Bureau, Commissioners, or any other staff member or organizational unit within the [FCC]." *Id.* at *i*. The PI respondents correctly note (Br. 4-8) that Congress has consistently recognized the need for the government, in performing the necessary function of allocating spectrum, to do so with an eye in part to establishing conditions that will encourage a diversity of voices, and the Commission itself has reached the same conclusion. See Cross-Pet. 20-21.

492a-499a (Order ¶¶ 409-419)) that it weighed different media differently based on empirical evidence it had gathered in a survey, which "ma[d]e it clear that some media are more important than others." *Id.* at 492a (Order ¶ 409). The Commission acknowledged that the survey "is not a perfect measure," but, after a thorough analysis, it reasonably concluded that it had "no reason to believe that all media are of equal importance," and it therefore acted reasonably in assigning different weights to different media. *Ibid.* The PI respondents do not challenge any aspect of that explanation.

The PI respondents also argue that the court of appeals correctly remanded the case because assigning equal weights to outlets in the same medium leads to the allegedly "absurd result[]" of small media outlets of one type (such as television stations) being assigned weights greater than larger outlets of another type (such as newspapers). PI Opp. 22. That argument ignores the Commission's well-reasoned choice to focus on the *availability* of a given medium—*i.e.*, the diversity created by the ability of many different voices to reach the public—rather than the market shares of individual stations—*i.e.*, the relative number of people who happen to choose to watch or listen to different voices at a particular point in time. See Cross-Pet. 23-24. The PI respondents, like the court of appeals itself, do not challenge the reasoning that the Commission invoked to support its legitimate policy choice. Their inability to rebut that reasoning simply confirms that the court of appeals inappropriately substituted its own view of how best to advance the public interest for the view of the Commission.

b. Similar errors infect the PI respondents' discussion of the Internet as a contributor to media diversity. PI Opp. 23. The cross-petition demonstrated that the court of ap-

peals erred when it concluded that the Commission had to identify specific Internet sites that currently provide local news and information before it could consider the Internet as a source of local news and information. The court should have deferred to the Commission's reasonable conclusion that the Internet has the *capability* to provide such content (and in fact does so) and thus may properly be deemed a local news and information source. Cross-Pet. 24-27.

Respondents do not take issue with that argument. Instead, they attempt to defend the court of appeals' view that because the Commission determined that cable television systems are not a source of local news and information, it had to treat the Internet in the same way. PI Opp. 23 (citing 04-1020 Pet. App. 52a). That view is mistaken. The Commission found that the administrative record contained insufficient evidence to conclude that cable television contributed to local diversity, 04-1020 Pet. App. 493a-495a (Order ¶¶ 412-414). By contrast, the administrative record did contain evidence that persons actually use the Internet for local news and public affairs information. *Id.* at 488a, 493a (Order ¶¶ 405, 412). Moreover, as explained in the cross-petition, the Internet has a far greater potential than cable television to deliver such information. Cross-Pet. 25-26 n.13. In particular, the Internet has no gatekeeper that exercises control over its content. *Ibid.* The Commission thus made the legitimate policy choice to consider the Internet as a source of local information and news. By overriding that administrative judgment, the court of appeals impermissibly substituted its own policy views for those of the Commission.

c. Finally, the conditional cross-petition shows that the court of appeals incorrectly failed to defer to the Commission's line-drawing determinations in the media ownership order. Specifically, the court erred when it reversed the

Commission's judgments about the permissible types of cross-media common ownership and the allowable number of commonly owned radio stations. Cross-Pet. 27-28.

For example, the PI respondents argue that the court of appeals correctly remanded the limits on local radio ownership "because of the irrational and inconsistent manner in which they were developed." PI Opp. 24 n.16. Respondents observe that, in setting the minimum number of post-transaction television station operators that must remain in a local market for a transfer-of-control transaction to be approved, the agency invoked the *DOJ/FTC Merger Guidelines*, but it did not similarly invoke those Guidelines with respect to radio station ownership. 04-1020 Pet. App. 103a. As explained in the cross-petition, however, the Commission used the *Merger Guidelines* as analogous authority when developing limits of television station ownership; it did not directly adopt or apply those Guidelines. Cross-Pet. 27 n.14. The law does not require the derivation of administrative rules in one area, such as television, to mirror precisely the derivation of rules in another, such as radio.

In any event, the Commission explained that the radio ownership tiers "ensure that, in markets with between 27 and 51 radio stations, there will be approximately five or six radio firms of roughly equal size," 04-1020 Pet. App. 402a-403a (Order ¶ 289), which is roughly equivalent to the result under the Commission's modified local television ownership rule, which ensures "that there are at least six firms in [a] significant number of markets." *Id.* at 348a (Order ¶ 207). The Commission committed no error when it developed radio station ownership limits without analogizing to the Guidelines.

B. The Court Should Deny All Of The Petitions In This Case, But If It Grants Any Petition, It Should Also Grant The Government's Petition

1. The National Association of Broadcasters (NAB) does not oppose the government's conditional cross-petition. See NAB Resp. 12. NAB argues, however, that the Court should grant its own petition for a writ of certiorari even if the Court denies the government's cross-petition. NAB claims that "granting the [government's] conditional cross-petition is [not] necessary for this Court to consider the issues raised in NAB's petition." *Id.* at 10. Whether or not it is possible to consider NAB's claims separately from the government's conditional cross-petition, however, it would be inappropriate, and inconsistent with this Court's practice, to consider the various constitutional and statutory challenges to the regulations without first considering the validity of those regulations under ordinary principles of administrative law. Cross-Pet. 19-20 (citing *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775, 793 (1978); *NBC* v. *FCC*, 319 U.S. 190, 226 (1943)). The government's cross-petition squarely presents that question, and NAB does not argue to the contrary. Accordingly, if the Court grants any of the petitions, including NAB's, it should also grant the government's petition.

2. NAB devotes the bulk of its response to the government's cross-petition to making a arguments that are in fact directed at supporting NAB's own petition. NAB Resp. 2-8. For example, NAB argues (Resp. 2-3) that Section 202 should be read as "placing [a] deregulatory 'thumb on the scale' in connection with the FCC's § 202(h) review of broadcast ownership restrictions."

Contrary to NAB's argument, there is no conflict between the D.C. and Third Circuits on the standard of review under Section 202. To be sure, there are verbal differ-

ences in the formulations used by the two circuits. But, as the cross-petition explains (at 16 n.7), the D.C. Circuit's most recent decision on the issue, in *Cellco Partnership* v. *FCC*, 357 F.3d 88, 98 (2004), held that a provision of the Communications Act using language virtually identical to that of Section 202(h) places no such "thumb on the scale," and the Third Circuit here adopted that same position. See 04-1020 Pet. App. 30a-32a. There is no conflict on that issue.

The court of appeals correctly rejected NAB's position, because nothing in Section 202 suggests that a "thumb on the scale" standard of review is appropriate. Although Section 202 requires the Commission to revise and liberalize specific media ownership limitations, Congress did not provide (as it could have done) that those new limitations should be permanent or should be viewed as the maximum limits permissible. To the contrary, Congress addressed the permanence of those limits in Section 202(h), where Congress ordered the Commission to engage in a regular review of "ownership rules" and to "repeal *or modify* any regulation it determines to be no longer in the public interest." 110 Stat. 111-112 (emphasis added). There is no reason to construe the phrase "or modify" to place a "thumb on the scale" with respect to what modifications are appropriate.

3. NAB also argues (Resp. 1-4) that the Court should grant review now in order to spare NAB's members the consequences of waiting for remand proceedings before the agency. The harm alleged by NAB, however, amounts to nothing more than an inability to achieve greater degrees of what NAB terms (*id.* at 1) "the benefits of common ownership" of radio stations and of the "top-4" television stations in a market. But rather than a showing of injury, that is just a restatement of NAB's position that the FCC erred

in determining that the public interest requires limitations on consolidation and cross-ownership by FCC licensees. Moreover, the radio station rules challenged by NAB themselves did not involve alteration of the numerical ownership limits. Instead, they involved the Commission's determinations that a commercially accepted ratings service provides a "more rational and coherent methodology" for defining local radio markets than the agency's former technique, 04-1020 Pet. App. 377a, and that joint sales agreements "put pricing and output decisions in the hands of a single firm" and should therefore be treated much like common ownership, *id.* at 425a. The FCC is an expert agency with very substantial experience and expertise in the broadcast industry. The Commission's line-drawing determinations on questions like those challenged by NAB do not warrant review by this Court.

* * * * *

For the foregoing reasons, and those stated in the cross-petition, all of the petitions for a writ of certioari should be denied. If the Court decides to grant any of the petitions, however, the government's cross-petition for a writ of certiorari should also be granted.

Respectfully submitted.

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